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IN THE

Supreme Court of the United States

October Term 1954

No. 323

THE ASSINIBOINE INDIAN TRIBE, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, The Assiniboine Indian Tribe, by its counsel, and prays that a writ of certiorari issue to review the judgment of the Court of Claims affirming the final determination of the Indian Claims Commission sustaining the motion of the United States for summary judgment and dismissing petitioner's amended petition for just compensation for the taking of petitioner's lands for public use.

OPINION BELOW

The opinion of the Court of Claims is not yet reported. A copy of the opinion is found in the Appendix hereto at page 1.

JURISDICTION

The opinion of the Court of Claims was handed down on June 8, 1954. That Court does not enter judgments or decrees in these cases. The last entry on the docket of that Court in this case is that an opinion was handed down on the above date affirming the decision of the Indian Claims Commission dismissing petitioner's petition.

The jurisdiction of this Court is invoked under Section 20(c) of the Indian Claims Commission Act (60 Stat. 1049, 1055) and Title 28 U.S.C. Section 1255, (62 Stat. 928). A copy of the Indian Claims Commission Act will be found in the Appendix hereto at page 21. The relevant portion of Title 28, U.S.C. Sec. 1255 is as follows:

> "Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant."

QUESTIONS PRESENTED

I. Is the decision of the Court of Claims in the case of the *Assiniboine Indian Nation* v. *The United States* (77 Ct. Cl. 347, April 10, 1933) a bar to the petitioner's recovery in the instant case under the doctrine of *res judicata.*

II. Did a jurisdictional act, which permitted suit *only* for *damages* for *wrongful taking,* by implication grant jurisdiction to sue for the *legal taking* prerequisite to judgment for *just compensation.*

III. Did the Court of Claims have jurisdiction under the special Jurisdiction Act under which the former case was heard to award just compensation for the taking of plain-

tiff's lands for public use under the power of eminent domain.

IV. Even if the statute in the former case conferred jurisdiction to award just compensation, is the decision in that case a bar to a judgment in the instant case if the question whether petitioner's land was taken under the power of eminent domain was not raised by the pleadings nor decided by the court in the former case.

V. Was it competent for Congress under its complete control over Indian affairs, to pass a second act conferring on the Indian Claims Commission and the Court of Claims the authority and duty to reconsider the petitioner's claim and award just compensation if it found that its lands had been taken under the power of eminent domain. If Congress had such power, has the Indian Claims Commission Act conferred such power on the Indian Claims Commission and the Court of Claims.

VI. Since the former case was decided have the decisions of this Court announcing the principle that just compensation should be awarded for the taking of the Indian's right of occupancy and use created an altered situation in which the former case is not a bar here.

VII. Does Section 2(1) of the Indian Claims Commission Act authorize that body to hear and determine the claims of an Indian tribe for just compensation where such claim has not been heard and determined on the merits.

VIII. Is the Indian Claims Commission Act to be strictly construed as was the rule with respect to special jurisdictional acts.

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The pertinent provision of the Fifth Amendment to the Constitution of the United States is as follows:

> "• • • Nor shall private property be taken for public use without just compensation."

The Act of Congress of March 2, 1927 (44 Stat. 1263) under which the former case urged as a bar here was decided. A copy of the said statute will be found in the Appendix at page 19.

The Indian Claims Commission Act (60 Stat. 1049; Title 25 USCA, Section 70-70v, Appendix at Page 21).

STATEMENT OF THE CASE

The petitioner filed its petition with the Indian Claims Commission claiming just compensation under the Fifth Amendment to the Federal Constitution for treaty lands taken by the Government for public use. The Government moved for summary judgment, the motion not being supported by either depositions or affidavits. The Commission sustained the motion in a written opinion.* Petitioner moved for a rehearing and for leave to amend its petition. Both motions were granted and petitioner filed its amended petition.

The amended petition set forth the material portions of a treaty between the United States of America and the French Republic, ceding territory of which the lands described in the petition were a part and also the material portions of the Treaty of Fort Laramie of September 17, 1851 (11 Stat. 749) by which a reservation was set apart and bounded for the use of the Assiniboine Indian Tribe.

The petitioner alleged that on July 2, 1864, the Congress of the United States chartered the Northern Pacific Railroad, the Act of Congress providing in part:

> "Section 3. *And be it further enacted,* That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of

* A copy of this opinion is not appended hereto as counsel for both parties are of opinion that it is not important here.

public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of the said railroad line * * *,"

* * * *

"Section 2 * * * The United States shall, extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this Act, and acquired in the donation to the (road) named in this Bill." (13 Stat. 365)

The petitioner alleged that when the Northern Pacific Railroad was constructed pursuant to the authority of the said Act, its line paralleled the eastern boundary of plaintiff's Fort Laramie Treaty lands as defined and bounded in the treaty, for a considerable distance. As a result of the statute and the construction of the road, the United States took approximately 2,267,504 acres of petitioner's Fort Laramie Treaty lands for public use without compensation or consideration of any kind, and conferred title to such acreage on the Northern Pacific Railroad Company. This was done without the consent of the petitioner. The average value per acre of petitioner's land so taken for public use at the time of such taking was $1.85 per acre and the total value of the land so taken was approximately $4,194,882.40. Petitioner claimed for this amount plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking, measured by a reasonable rate of interest from the time of taking to the date of payment, or arrived at by such other method as the Commission might adopt.

The petitioner further alleged that by an Executive Order of August 18, 1868, a part of the Fort Laramie Treaty lands of petitioner was set apart as a military reservation for the use and benefit of the United States the reservation being known as Fort Buford. The lands so taken to establish the military reservation included approximately 169,574 acres of plaintiff's Fort Laramie Treaty lands. After Fort Buford was abandoned as a mili-

tary reservation, the Congress of the United States passed an act approved May 19, 1900, (31 Stat. 180) directing that the lands within the said reservation which were not otherwise occupied or used for any public purpose be made subject to disposal under the Homestead, Townsite and Desert Land Laws. By the said Act of Congress the United States took 169,574 acres of plaintiff's lands for public use without compensation or consideration of any kind, sold them or opened them up for public settlement under the land laws and covered the proceeds thereof into the Treasury of the United States. The petitioner further alleged that the value of the land so taken was $295,058.76, which sum, plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking, measured by a reasonable rate of interest from the time of taking to the date of payment, is the just compensation to which the plaintiff is entitled under the Fifth Amendment to the Federal Constitution.

The petitioner further alleged that a portion of its Fort Laramie Treaty Reservation lands consisting of 4,040,862 acres, was by an unauthorized Executive Order, dated April 13, 1875, "withdrawn from sale" and set apart as an addition to the then reservation of the Gros Ventre, Piegan, Blood, Blackfeet and Crow Indians.

Petitioner further alleged that by an unauthorized Executive Order of July 13, 1880, a large portion of its Fort Laramie Reservation was "restored" to the public domain and all lands covered by the Executive Orders of April 13, 1875, and July 13, 1880, were thrown open for public entry and settlement, or sold as public lands and the proceeds of the sales covered into the United States Treasury. The land included in the Executive Orders of April 13, 1875 and July 13, 1880 was taken for public use without compensation or consideration of any kind and disposed of under the land laws of the United States, together with that part of plaintiff's land lying between the south boundary of the land embraced in the Executive Order of July 13, 1880, and the Yellowstone River.

Petitioner further alleged that Congress was fully advised from time to time that petitioner's Fort Laramie Treaty lands not included in the Northern Pacific Act or the Fort Buford Reservation, were being disposed of by the Government and the proceeds being covered into the Treasury of the United States. With full knowledge of the taking and disposition of such lands Congress did not take any steps to restore the lands to their rightful occupants, or to compensate plaintiffs for such lands. The United States, therefore, ratified and confirmed the action of the Government in appropriating and disposing of the plaintiff's Fort Laramie Treaty lands. Such ratification related back to the unlawful takings under the Executive Orders and rendered them lawful takings under the power of eminent domain. Ten copies of the Amended Petition before the Commission are being delivered to the Clerk of this Court with the request that they be regarded as a further appendix to the petition.

The Government moved for summary judgment on the Amended Petition before the Indian Claims Commission on the ground that the previous decision in the case of the Assiniboine Indians against the United States (77 C. Cls. 347) was a bar to a judgment in this case under the doctrine of *res adjudicata*. No affidavits or depositions were filed by either party and the case was decided on the allegations of the petition and the bare motion. All facts properly pleaded in the petition must therefore be taken as admitted. The Commission sustained the motion for summary judgment. Its opinion will be found in the Appendix at page 33. The final order of the Commission will be found in the Appendix at page 58.

Petitioner appealed the case to the Court of Claims, which affirmed the action of the Indian Claims Commission. Judge Madden dissented from the opinion of the majority. He did not write a dissenting opinion, but relied on his dissenting opinion in *Blackfeet & Gros Ventre Tribes of Indians* v. *United States* (119 Fed. Sup. 161). A copy of

Judge Madden's dissenting opinion in that case will be found in the Appendix at page 59.

In the former Assiniboine case urged here as a bar counsel believed, as will be shown below (infra, pp. 9-15), that the statute authorized damages for unlawful taking only. Its amended petition, on which the prior case was decided, alleged unlawful takings only and in support of its allegations plaintiff relied on three unauthorized Executive Orders. No claim for just compensation or for interest was made in the pleadings, no mention thereof in its briefs and it was not alluded to in the opinion of the court. Those parts of the opinion of the Court of Claims in that case dealing with Petitioner's reservation lands appear in the appendix at p. 63 and the judgment of the Court at appendix p. 71.

Petitioner's appeal to this Court was dismissed and its petition for a writ of certiorari denied (292 U.S. 606).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims, if not reversed, deprives the petitioner tribe, wards of the Government, of any hearing, by a court, on the merits of its claim for just compensation. The Court, counsel submits, reached its conclusion by a construction of the Act of March 2, 1927, under which the former case was decided, which is inconsistent with many decisions of this Court holding that a special jurisdictional act submitting Indian claims to the Court of Claims must be strictly construed and no judgment rendered on any point not clearly committed to the Court by the special act, this for the reason that jurisdiction over Indian claims was specifically denied to the Court by the Act of March 3, 1863 (12 Stat. 767), and the Act of March 3, 1911 (36 Stat. 1138). The following cases are in point. *Ex Parte Atocha* (17 Wall. 439); *Price* v. *United States and Osage Indians* (174 U.S. 373); *Wichita Indians, et al.*, v. *United States* (89 Ct. Cl. 378, 416); *Chippewa Indians* v. *United States* (305 U.S. 479); *Sisseton and Wahpeton Bands of Sioux Indians* v. *United States* (277 U.S. 424).

A suit by an Indian tribe posited on a violation of the plaintiff's constitutional rights could not be entertained by the Court of Claims when the former case was decided unless jurisdiction to entertain it was clearly conferred by the Act of Congress (*United States* v. *Reese*, 92 U.S. 214).

The claims which the Court of Claims was authorized by the Jurisdictional Act to determine are to be found in Section 1 of the Act. Since there is much contention concerning the construction of the Act, we are justified in resorting to the legislative history to determine the intention of Congress.

The bill was introduced in the Senate as S. 2141. As it passed the Senate Section 1—the jurisdictional section and Sec. 4 were as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America and Congress assembled,* That all claims of whatsoever nature which the Assiniboine Indian Nation or Tribe may have against the United States, which have not heretofore been determined by a court of competent jurisdiction, may be submitted to the Court of Claims for determination of the amount, if any, due said Indians from the United States under any treaty or agreement or law of Congress, or for the misappropriation of any of the property or funds of said Indians, or for the failure of the United States to administer the same in conformity with any treaty or agreement with the said Indians; * * * and jurisdiction is hereby conferred upon said Court of Claims with the right to appeal to the Supreme Court of the United States by either party, to hear and to determine all legal and equitable claims of whatsoever nature which said Indians may have against the United States, it being the intent of this Act to confer upon the said Court of Claims full and complete authority to adjust and determine all claims submitted thereunder so that the rights, legal and equitable, both of the United States and of said Indians may be fully considered and determined and to render judgment thereon accordingly."
>
> * * * * * * * * *

"Section 4. That if it be determined by the court that the United States, in violation of the terms and provisions of any EXECUTIVE ORDER, law, treaty, or agreement, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Assiniboine Indians in and to such money or other property." (See Appendix p. 71.)

It will be noted that the provisions of Section 1 were very broad and that Section 4 of the Act, as it passed the Senate, provided for interest at 5 per cent per annum on the value of the property at the time of taking. Since, as will be shown later, there had been at the time of the passage of the bill in the Senate no decision authorizing just compensation for the taking of Indian title to land, it is possible that the Senate intended so to word the Act as to permit the awarding of the equivalent of just compensation without using that term.

However, when the bill went to the House that body struck out the entire first section and inserted a substitute which was as follows:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate, and render judgment in any and all claims arising under or growing out of the Treaty of Fort Laramine of September 17, 1851 (Eleventh Statutes, page 749), between the Government of the United States and the Assiniboine Indian Nation and other Indian nations therein specified; and the treaty of October 17, 1855

(Eleventh Statutes, page 657), between the Government of the United States and the Blackfeet Indian Nation and other Indian nations therein specified; or any subsequent Act of Congress, or any treaty, Executive oreder, or treaty with any other Indian tribe or nation that violates any of the treaty rights of the Assiniboine Indian Nation which the said Assiniboine Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States; and jurisdiction is hereby conferred upon the said courts to determine whether or not any provision in any such treaty has been violated or breached by any Act or Acts of Congress, or by any treaty made with any other Indian tribe or nation, and, if so, to render judgment for the damages resulting therefrom."

A copy of the pertinent portions of the Bill as reported by the House Committee will be found in the Appendix at page 73.

It will be seen that Section 1 of the Bill as reported by the House Committee on Indian affairs is totally different from that section as the Bill passed the Senate. The broad language in the first part of the section conferring jurisdiction to hear and determine "all claims of whatsoever nature" was stricken, as was the language "to hear and determine all legal and equitable claims of whatsoever nature * * * it being the intent of this Act to confer upon said Court of Claims full and complete jurisdiction to adjudicate and determine all claims submitted hereunder so that the rights, legal and equitable, both of the United States and of said Indians may be fully considered and determined and to render judgment thereon accordingly." In place of the language stricken there was substituted language which, when fairly construed, confers jurisdiction only to award damages for a violation or breach of the Fort Laramie Treaty. It is true that the first clause of the Act covers claims arising under or growing out of the Treaty of Fort Laramie and out of the Black Feet Treaty

of October 17, 1855, but the remainder of the section is limited to violations or breaches of treaty rights. The last clause in this section confers jurisdiction to determine whether or not any provision of any such treaty has been violated or breached by the United States by Acts of Congress or otherwise. If, as the Government contends, the first clause in this section confers jurisdiction over the taking of land under the power of eminent domain, it is certainly broad enough to confer jurisdiction over wrongful takings, and the remainder of the section does not add anything to the court's jurisdiction and could have been omitted without changing the jurisdiction of the court. Counsel believe that the language after the first clause of Section 1 was intended to make it clear that jurisdiction was conferred only to award damages for Acts of the Government which violated or breached the treaty rights of the petitioners.

It will also be noted that Section 4 of the Act, as amended by the House, is tied to violations of any Executive order, law, treaty, or agreement set forth and referred to in Section 1. We submit that Section 1 of the Act, when read as a whole and when considered in light of Section 4 as the Bill passed the Senate and as it appeared in the law as finally enacted, clearly confers jurisdiction on the Court to award damages for violation or breach of treaty obligations only. The taking of petitioner's land under the power of eminent domain was not in violation or breach of treaty. If in the proper exercise of its power of eminent domain the United States today took land within an Indian reservation for public use, such taking would not be a violation of the treaty or agreement establishing the reservation any more than the taking of land owned under a patent from the United States would be a violation or breach of the patent.

When the Bill went to conference between the two houses, that part of Sec. 4 providing for interest on the judgment was stricken, a further evidence Congress was not in-

tending to award just compensation. The law as finally enacted appears in the Appendix at p. 19.

The Court of Claims in the former case was of the opinion that the statute conferred jurisdiction to award damages for unlawful takings only. At page 362 of its Opinion (77 C. Cls. 362) it stated:

> "Jurisdiction is conferred by two jurisdictional acts of Congress which authorize the Court to award the plaintiff any damages which it may have sustained by *wrongful* appropriation of its land * * *." (Emphasis supplied)

The Court below in holding that the Act under which the former case was decided conferred jurisdiction to award just compensation quotes from the report of the Senate Committee on the bill as follows:

> "This bill is drafted in broad language to permit a final adjudication of all the claims of the Assiniboine Indians. The Committee is convinced that it is advisable from the standpoint of promoting good feeling among the Indians, to provide for a final adjudication of all their claims. * * * This bill is designed to clearly give to the Court of Claims authority to adjudicate any *claims for violation of treaties* made with the Assiniboine Indians and to render judgment for damages resulting therefrom." (Emphasis supplied)

This language applied to the bill as it passed the Senate, not as amended by the House. Moreover, it appears to counsel, to limit the intention of the Senate to damages for the violation or breach of treaty. The language of the fourth section of the Act conferring jurisdiction to award "damages" is also significant. "Damages" and "just compensation" are not generally regarded as equivalent legal terms.

The Court also states that petitioner relied on Section 4 of the Act as showing that the jurisdiction of the Court was limited to those claims that arose from an unlawful taking of its land. This does not state accurately the position

of petitioner before that court. At page 30 of its Brief in Chief, counsel made the same argument with respect to the construction of Section 1 of the Act that it makes above (Supra, pages 11-12). Petitioner relied on Section 4 as confirming its contention with respect to the construction of Section 1.

The Court also states that petitioner relied upon the statement of the House managers attached to the conferees' report. That statement was in part as follows:

> "It (the language of the bill as amended by the conferees) eliminates the payment of interest on all funds that may be recovered by the Indians but provides for the payment of interest on those items which carried interest when authorized by Congress and which have been withheld from the tribe."

We think that the words "eliminates the payment of interest" show that the Court was not authorized to award just compensation.

The Court below also relied upon the opinion of this Court in the second *Klamath* decision (304 U.S. 119, April 25, 1938). It quoted that part of the opinion construing Section 3 of the Act which is virtually identical with Section 4 of the Assiniboine Act. The court failed to state, however, that Section 1 of the Act under which the *Klamath* case was decided was virtually identical with the first section of the Assiniboine Act as it passed the Senate and was totally different from the first section of the Assiniboine Act as finally agreed to in conference. Moreover, the second decision of this Court in the *Klamath* case is based upon the second jurisdictional Act of May 15, 1936 requiring the Court of Claims to reconsider the case and determine it to the merits and upon the reports of the Senate and House Committees which stated that it was intended to give the "Klamath Tribe the right to have their claims for just compensation" judicially determined upon the merits (304 U.S. 125, Footnote

14). The Court did not even refer to the jurisdictional section of the first Act.

In not one of the jurisdictional acts under which just compensation has been awarded is the jurisdictional section as narrow and limited as that in the Assiniboine Act under which the former case was decided. We reproduce in the footnote the relevant provisions of those Acts.[1]

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[1] *Yankton Sioux Case.* The jurisdictional portion of the first Act was as follows: "* * * all claims of the Sioux Indians against the United States," * * * A second Act contained the following: "* * * to determine * * * the interest, title, ownership, and right of possession of the Yankton Band of Santee Sioux Indians in and to the land known as the 'Red Pipestone Quarries'" and to enter judgment for the amount "legally and equitably due from the United States to Petitioner." (272 U.S. 351, Nov. 22, 1926: 41 Stat. 738)

Creek Case. Adjudicate and render judgment "in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States * * *" and the plaintiff Indians "or arising under or growing out of any Act of Congress in relation to Indian affairs * * *." (77 Ct. Cl. 159, March 13, 1933: 43 Stat. 139)

Shoshone Case. "To hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone tribe of Indians * * * might have against the United States arising under or growing out of the Treaty of July 3, 1868, or arising under or growing out of any subsequent treaty or agreement between said Shoshone Tribe and the United States or any subsequent act of Congress affecting the tribe." (82 Ct. Cl. 23, 641, Dec. 2, 1935: 44 Stat. 1349)

Klamath Case. "All claims of whatsoever nature which the Klamath * * * tribes of Indians and the Yahooskin band of Snake Indians, parties to the treaty with the United States, concluded October 14, 1864, may have against the United States, which have not heretofore been determined by the Court of Claims * * * for determination of the amount, if any, due said Indians from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said Indians, or for the failure of the United States to pay said Indians any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims * * * to hear and determine all legal and equitable claims, if any, of said Indians against the United States, and to enter judgment thereon * * * That if it be determined by the Court of Claims in the said suit herein au-

2. The decision of the Court below is inconsistent with decisions of this Court holding that where intervening decisions have created a changed situation or a different legal atmosphere the former decision is not a bar.

The Court states in its opinion that at the time the former case was decided (1933) it was well established that if the United States took private property for public use the owner was entitled to just compensation, stating the rule for determining just compensation, and citing eight decisions of this Court in support. Four of the cases cited were brought by citizens other than Indians and were decided prior to the decision in the former *Assiniboine* case. These cases are not in point for the reason that they were brought under the general jurisdiction of the Court of Claims which had in such cases for years awarded just compensation. The other four cases were Indian cases all decided after the decision in the former *Assiniboine* case and could not, therefore, have been relied on by the plaintiff or the Court in the former case.

At the time of the decision in the former *Assiniboine* case neither this Court nor the Court of Claims had ever decided that just compensation could be awarded for the taking of *Indian title to lands*, that is, *the right of occupancy and use*. In the *Yankton Sioux* Case (272 U.S. 351) the Indians owned both the fee simple title to the land by contract with the Government and the right to occupation and use. In the *Creek* case decided by the Court of Claims March 13, 1933 (77 Ct. Cl. 159) that Court did not award just compensation, but the decision was reversed by

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thorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of said land at the time of said appropriation * * *." (85 Ct. Cl. 452, 453, June 7, 1937: 41 Stat. 623)

Rogue River Case. "* * * to hear, examine, adjudicate and render final judgment (a) any and all legal and equitable claims, arising under or growing out of any treaty, agreement, act of Congress or Executive order," (105 Ct. Cl. 495, 499, Feb. 14, 1946; 49 Stat. 801)

this Court (295 U.S. 103), the date of the decision being April 20, 1935, or approximately two years after the former *Assiniboine* case here urged as a bar. In this case also, the Creek nation *owned the fee* simple title to the land.

It was not until the decision of this Court in the *Shoshone* case (299 U.S. 476), decided January 4, 1937, that it was established that an Indian tribe was entitled to just compensation under the Fifth Amendment for the occupation and use of lands taken by the Government for public use.

In the state of the decisions, as shown above, it is unthinkable that the Court of Claims would have awarded just compensation in the former case, if it had been demanded.

But the decision of this court in the *Shoshone* case more than four years after that in the former *Assiniboine* case established a new rule for just compensation in Indian cases, i.e., just compensation could be awarded for the taking of Indian title. Under the decisions of this Court where there has been an intervening decision between the two cases creating a new and different situation, the first case is not a bar to a judgment in the second.

Blair v. *Commissioner*, (300 U.S. 5) involved the liability of a beneficiary of a testamentary trust for a tax upon the income which he had assigned to his children prior to the tax years and which the trustees had paid to them accordingly. The question first arose with respect to the tax year 1923 and when the case reached the Federal Court of Appeals it held that the trust was a spendthrift trust and the assignment invalid. Thereupon the trustees brought suit in Illinois to obtain a construction of the will. The Illinois courts held that the trust was not a spendthrift trust and upheld the assignments. At that time there were pending before the Board of Tax Appeals proceedings involving the income of the trust for the years 1924, 1925, 1926 and 1929. The Board received in evidence the record of the suit in the state court, and overruled the Commissioner's determination as to the petitioner's liability. When the case reached this Court it said with

respect to the Government's contention that the judgment relating to the income of 1923 was *res judicata.*

> "Here, after the decision in the first proceeding, the opinion and decree of the state court created a new situation. The determination of petitioner's liability for the year 1923 had been rested entirely upon the local law. *Commissioner* v. *Blair,* 60 F. 2d 340, 342, 344. The supervening decision of the state court interpreting that law in direct relation to this trust cannot justly be ignored in the present proceeding so far as it is found that the local law is determinative of any material point in controversy."

Since the decision of the state court that the trust was not a spendthrift trust was binding this Court held that the rule followed in the case involved in the tax year 1923 was not *res judicata* as to the subsequent years.

In *State Farm Insurance Company* v. *Duel,* 324 U.S. 154, this Court said:

> "But if that principle is inapplicable here it is nevertheless the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation. 2 Freeman on Judgments (5th ed. 1925) § 713; *Blair* v. *Commissioner,* 300 U.S. 5, 9; *West Coast Life Ins. Co.* v. *Merced Irrigation Dist.,* 114 F. 2d 654, 662; *In re Pomeroy,* 51 Mont. 119, 151 P. 333; *Hurd* v. *Albert,* 214 Cal. 15, 26, 3 P. 2d 545. We cannot find that Wisconsin has a different rule."

In *Commissioner of Internal Revenue* v. *Sunnen,* 333 U.S. 591, 600, this Court said:

> "If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation. See *Travelers Ins. Co.* v. *Commissioner,* 161 F. 2d 93. And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive. See *State Farm Ins. Co.*

v. *Duel*, 324 U.S. 154, 162; 2 Freeman on Judgments (5th ed. 1925) § 713. As demonstrated by *Blair* v. *Commissioner*, 300 U.S. 5, 9, a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable."

See also *Marcum* v. *Marcum et al.*, 70 F. 2d 760; *Mays* v. *Wilkenson et al.*, 12 F. Sup. 350, 351.

The court below brushed aside the decisions in the cases last above cited with the statement that all of them dealt with the effect of the collateral estoppel branch of the rule, and, therefore, had no bearing on the instant case. We do not agree that all of the cases cited involve collateral estoppel, but in any event we believe the rule announced applies to both branches of the doctrine of estoppel by judgment. The identical legal reasoning supports both branches of the rule. The purpose is to put an end to litigation and the rule referred to generally as collateral estoppel was originated and invoked to prevent the plaintiff from retrying points definitely decided in the first case, although the two cases were based on different causes of action. The decision of this Court in *Commissioner* v. *Sunnen*, 333 U.S. 591, we think recognizes that the legal reasoning back of the two branches of estoppel by judgment is identical.

3. The court below failed to give effect to decisions of this court holding that where the causes of action in the two cases are different, the judgment in the first case is not a bar. *Wilmington Weldon RR Co.* v. *Arlsbroock*, 146 U.S. 279, 300, *Radford* v. *Myers*, 231 U.S. 725, *Friend* v. *Talcott*, 228 U.S. 27, *Mercoid Corporation* v. *Mid-Continent Investment Co.*, 320 U.S. 661, 671, *Larsen* v. *Northland Transportation Co.*, 292 U.S. 20.

In *Fayerweather* v. *Ritch*, 195 U.S. 276, 299, this court said:

"Private right and public welfare unite in demanding that a question once adjudicated by a court of compe-

> tent jurisdiction shall, except in direct proceedings to review, be considered as finally settled and conclusive upon the parties. *Interest reipublicae ut sit finis litium.* But in order to make this finality rightful it should appear that the question was distinctly put in issue; that the parties presented their evidence, or at least had an opportunity to present it, and that the question was decided."

In *Mayor of Vicksburg* v. *Henson,* 231 U.S. 259, 268, this court said:

> "It is no less true that to hold upon any unsubstantial ground that a controversy has been thus concluded is to do an injustice to litigants. We must therefore be careful to see, when the contention of former adjudication is made, that the matter was actually presented and decided and the rights of the contending parties thereby concluded."

This court in the case of *Baltimore Steamship Co.* v. *Phillips,* 274 U.S. 316, 321, defined cause of action as follows:

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The *thing,* therefore, which in contemplation of law as its *cause,* becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*" ' "

Under the decisions quoted above and the definition of cause of action by this court, it seems clear that the instant

case is based on a different cause of action than the former case. The former case was grounded on a tortious taking by the Government by unauthorized Executive Orders. The instant case is based in part on Acts of Congress directly taking the lands and in part on a tortious taking subsequently confirmed by Congress. The legal principles, therefore, are different. The proof also in the two cases would not be identical. In the instant case petitioners would have to prove that patents issued to the Northern Pacific Railroad Company pursuant to the Act of Congress; that patents were issued to citizens for the land in the Fort Buford Reservation; and that Congress with full knowledge of the illegal taking of the remainder of the land took no action either to restore the land to the rightful owners or to compensate them for it. It is submitted that the cause of action in the two cases is not the same.

The question whether the petitioner's land was taken under the power of eminent domain was not put in issue by the pleadings in the former case, no evidence was introduced on the point and the question was not touched on in the opinion.

That the subject matter of the suits is the same is not a bar if the cause of action is different. *Tyler* v. *Standard Sign Company*, 102 New York Supplement, 65, 67, *State of Wisconsin* v. *Torinus*, 9 Northwestern 725, 730, *National Fire Insurance Company* v. *Hughes*, 189 New York 84, *Machen* v. *Rudd Wheel Co.*, 265 Mich. 530, *McAndrews* v. *Chicago, L.S. & E. Co.*, 162 Fed. 856 (Circuit Court of Appeals, Seventh Circuit), *Boyd* v. *Atlantic Coastline RR Co.*, 218 Fed. 653.

4. The case involves the construction and application of the Indian Claims Commission Act which has not thus far been construed by this Court. The statute authorizes the Commission to entertain claims under the Constitution. Was it the intention of Congress that the defense of *res*

judicata should defeat a claim for just compensation where no court had ever passed on the question whether the tribe was entitled to just compensation. In the instant case the court below did not determine whether the amended petition before the Indian Claims Commission stated a cause of action for just compensation, stating that it was not necessary to do so.

The principle is well established that if the legislature has changed the law, since the first decision, that decision is not a bar to a judgment in the second case. *State Farm Mutual Auto Ins. Co.* v. *Duel*, 324, U. S. 154; *Blair* v. *Commissioner of Internal Revenue*, 300 U.S. 5, 9; *West Coast Life Insurance Co.* v. *Merced Irrigation District*, 114 Fed. (2d) 654, 662; *Hurd* v. *Albert*, 214 Calif. 15, 26; *State* v. *Torinus*, 28 Minn. 175; *Steele County* v. *Erskin, et al.*, 98 Fed. 215; *Hutchinson* v. *Patching, et al.*, 131 S.W. 400; *Commissioner of Internal Revenue* v. *Arundel-Brooks Concrete Corp.*, 152 Fed. (2d) 225; *Quattlebaum, et al.* v. *Plant*, 181 S.W. (2d) 13; *Miles et al.* v. *Strong et al.*, 36 Atl. 55; *Bekins et al.* v. *Lindsay-Strathmore Irrigation District*, 114 Fed. (2d) 680.

We think it clear that Congress in enacting the Indian Claims Commission Act intended that an Indian tribe should have a hearing on a claim that has not been decided or considered by a court on its merits. The statement of the House Managers with respect to the Senate Amendment permitting the Government all defenses except the plea of the statute of limitations and laches, was in part as follows:

> "Nor is this amendment intended to preclude the adjudication by the Commission of any claim authorized to be heard and determined under this section which has not been in fact previously adjudicated or settled on its merits, or as to which it has been previously held that the court had no judicial power to determine."
>
> (Page 6 Conference Report on H.R. 4497)

Petitioner's claim for just compensation has not been passed upon by any court. To construe the Indian Claims Commission Act so as to authorize it to hear petitioner's claim would not be to change the substantive law, as the court below seemed to think. It would only be so to construe the Act as to give effect to the expressed intent of Congress when passing the legislation. On this point see the able dissenting opinion by Judge Madden in the *Blackfoot* case (Appendix, page 59) adopted by him as his dissent in the instant case.

Sections 285 and 286 of the U.S. Code, Title 28 (Act of March 3, 1863, and March 3, 1911) quoted by the court below have no application to an Indian case in the Court of Claims heard under a special jurisdictional act. Such special acts expressly provide the character of sums which may be set off, the finality of the judgment, etc. (See Act under which original case was decided, Appendix, p. 19.) It would seem clear that the Act of March 3, 1863, could not apply to such cases because that Act expressly denied to the Court of Claims any jurisdiction over Indian claims. This was not changed by the Act of March 3, 1911.

In fact the so-called judgment in the former case was not more than a dismissal. The Court of Claims after holding that "there is no question but what the lands granted to the plaintiff tribe by the Treaty of Fort Laramie were taken over by the Government", further held:

> "It is not necesary, however, that we should determine whether the plaintiff tribe had abandoned these Fort Laramie lands. For reasons hereinafter set forth, we conclude that even if plaintiff is allowed the value of these lands at the time they were taken, the defendant is entitled to set-off against the allowance a greater sum."
>
> • • • • •
>
> "We conclude that the value of this land at the time it was taken did not *exceed* 50 cents an acre and *may have been less,* and that its total value did not *exceed* $3,238,970."
>
> • • • • •

> "Assuming for the purposes of this case that none of these items should be credited against the plaintiff tribe, we have a total of $910,195.15 which should be deducted from the amount estimated by the Comptroller General's office, leaving a net credit to the Government of $4,227,474.56, while we have found that the value of the land belonging to the plaintiff tribe which was appropriated by the Government did not *exceed* $3,238,970."

As shown above, it is obvious that the Court of Claims did not reach a decision which could constitute *res adjudicata,* because there was no determination that the United States was or was not indebted to the petitioner tribe, or that if liability existed on the Government's part, what particular expenditures were to be utilized to extinguish that liability in whole or in part. The petitioner tribe was and is entitled to have an exact determination of the amount owed it by the United States, which determination has never been made. See *Seminole* v. *United States,* 316 U.S. 286; idem p. 310, and *Chickasaw Nation* v. *United States,* 326 U.S. 217, in which this court pointed out the legal shortcomings of such action by the Court of Claims.

There having been no determination that the United States was or was not under any liability to the petitioner tribe; no determination that the United States was liable to the petitioning tribe in a particular amount; no precise finding and designation of the exact amount of particular set-offs to which the Government might have been entitled to credit against any amounts found due by it, the previous decision cannot be said to constitute a judgment in behalf of the petitioning tribe and a satisfaction thereof by the Federal Government as erroneously asserted by the court below in the opinion here under review.

5. The court below failed to adhere to the decisions of this Court that a statute remedial in nature must be liberally construed, particularly if any other construction would defeat the specified purpose of the statute. The effect

of the decision below is that the Indian Claims Commission Act should be as strictly construed as previous special acts conferring jurisdiction on the Court of Claims to hear and determine Indian claims, in complete disregard of the clearly expressed and plain intention of Congress. On this point see the dissenting opinion of Judge Madden in the *Blackfoot* case (Appendix p. 59) upon which he based his dissent to the decision here under consideration.

The suit in this action was brought under the jurisdictional provisions of Section 2 of the Indian Claims Commission Act which includes "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." (Appendix p. 22) The stated purpose and intent of everyone concerned with the enactment of this statute was the adoption of a general waiver and granting all Indian tribes an opportunity through the Indian Claims Commission for the settling for all time ancient wrongs (real or supposed) to which they had been subjected by the Federal Government. In spite of this, under the interpretation placed upon the Act by the Court below, the petitioner Indian tribe is being denied an opportunity to prove its claim under any of the provisions of Section 2 of said Act.

Section 11 of the Indian Claims Commission Act provides in part:

> "• • • Provided further, that the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit."

Through the use of this language Congress could not have made any clearer its intent that claims based on "fair and honorable dealings that are not recognized by any existing rule of law or equity" and, therefore, clearly not susceptible to the bar or defense of *res adjudicata* could properly

arise out of the subject matter of one of the other specified types of claims. It is also equally clear from the reading of the entire Act that Congress intended Indian tribes in the position of the petitioning tribe to be allowed to have "their fair day in court." (See Judge Madden's dissenting opinion at Appendix P. 59)

CONCLUSION

Wherefore, it is respectfully submitted that the petition for writ of certiorari to review the decision of the United States Court of Claims be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 323

THE ASSINIBOINE INDIAN TRIBE,
Petitioner,

v.

THE UNITED STATES,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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DECISION OF THE COURT BELOW IN THE INSTANT CASE.

IN THE UNITED STATES COURT OF CLAIMS

Appeals Docket No. 1-53

(Decided June 8, 1954)

THE ASSINIBOINE INDIAN TRIBE v. THE UNITED STATES

Messrs. Adrien F. Busick and *Louis A. Gravelle* for appellant. *Messrs. Douglas Whitlock, Delmar W. Holloman,* and *Davies, Richberg, Beebe, Busick & Richardson,* were on the briefs.

Mr. Ralph A. Barney, with whom was *Mr. J. Edward Williams, Acting Assistant Attorney General* for appellee.

OPINION

LITTLETON, *Judge,* delivered the opinion of the court:

This is an appeal from a final determination of the Indian Claims Commission. *Assiniboine Indian Tribe* v. *United States,* 2 Ind. Cl. Com. 272. The appellant filed an amended petition with the Commission alleging a claim under clause (1) of Section 2[1] of the Indian Claims Commission Act (60 Stat. 1049, 25 U. S. C. 70a) for approximately $23,000,000, as just compensation. The appellant alleged that the land given to it by the Fort Laramie Treaty of 1851 (11 Stat. 749) was taken by the United States for public use under the power of eminent domain without rendering just compensation as required by the Fifth

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[1] The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; * * *

Amendment to the Constitution. The appellee filed a motion for summary judgment on the ground that the issues involved therein were *res adjudicata* under the decision of this court involving a claim for the same land in *Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347. The motion was granted and appellant's amended petition was dismissed.

The appellant entered into the Fort Laramie Treaty of 1851 with the United States, wherein it was agreed that appellant would have the right to the use and occupancy of approximately 6,477,940 acres of territory which was described in that treaty. By various Executive orders and Acts of Congress, which are set forth in the former opinion of this court and in the opinion of the Commission, this entire territory was taken by the United States and later disposed of as public land without rendering any compensation to the Assiniboine Tribe therefor.

A special jurisdictional act (Act of March 2, 1927, 44 Stat. 1263) was passed by Congress pursuant to which appellant presented to this court for adjudication a claim, *inter alia,* with regard to the identical land for which just compensation is now being sought. This court in adjudicating the case on its merits held that appellant had the right to the use and occupancy of this territory; that the United States had appropriated the entire territory without rendering any compensation to the tribe therefor; that the value of the territory at the time of such appropriation did not exceed 50 cents an acre or $3,238,970; that the amount which the United States was entitled to offset against this allowance (77 C. Cls. 361-362) was a greater sum and therefore this judgment in favor of the tribe was satisfied by the judgment against the tribe for the offsets and final judgment was entered dismissing the petition. A motion for a new trial on grounds not here pertinent was overruled. A petition to the Supreme Court for writ of certiorari on the grounds on which this court had adjudicated the case was denied. *Assiniboine Indian Tribe* v. *United States,* 292 U. S. 606.

In its appeal to this court from the determination of the Commission dismissing its amended petition, appellant con-

tends that the Commission erred in holding that the issues involved were *res adjudicata* because (1) the jurisdiction of this court in the former case was limited to allowing recovery based on an unlawful taking; (2) the cause of action involved in the former case was for damages for an unlawful taking whereas a separate and distinct cause of action is now being presented for just compensation for a lawful taking under the power of eminent domain; (3) appellant is not splitting its cause of action; (4) the taking was under the power of eminent domain because Congress either authorized or ratified it; (5) the legislative history of the Indian Claims Commission Act establishes appellant's right to have the present claim adjudicated on its merits; (6) *res adjudicata* is no defense where intervening decisions have created an altered situation; and because (7) *res adjudicata* is no defense where there has been a change in the law.

The appellee contends that the dismissal of appellant's amended petition by the Commission on the ground that the issues involved were *res adjudicata* was correct because (1) there has been no change in the law so far as this case is concerned; that this court in the former case had jurisdiction under the special act to award just compensation for the taking of appellant's Fort Laramie treaty land; (2) appellant's cause of action for the taking of this land was adjudicated on its merits by this court after a full hearing and judgment was rendered thereon; (3) the failure to demand interest or its equivalent as a part of just compensation does not prevent the application of the rule of *res adjudicata;* (4) the claim now being presented does not represent a different or separate cause of action, but rather is the same cause of action with respect to the same lands based on a different legal theory; (5) just compensation is only recoverable when the United States takes private property for public use under the power of eminent domain, which is a lawful taking, therefore, if this court found in the former case that the taking was unlawful, the judgment being unmodified and not reversed is conclusive on the manner of acquisition and consequently bars appellant's present claim; (6) and because at the very minimum,

the value of the land at the time of the taking was conclusively established by the former decision and collateral estoppel bars appellant from relitigating that question.

We consider first appellant's contention that it had two separate and distinct causes of action for the taking of the same land. There is no doubt that the use and occupancy title given appellant by the Fort Laramie treaty of 1851 was a property right; that this property right was invaded when the United States took the land; and that this violation gave rise to at least one cause of action. We hold that the appropriation of appellant's land by the United States gave rise to but one cause of action in appellant for the deprivation or taking of the same land. Whether appellant had a cause of action for just compensation or for breach of treaty was dependent upon the nature of the taking.

Of course, if the taking of the land by the United States for public use in violation of the treaty had been pursuant to authority granted by Congress, appellant would have had a cause of action for just compensation. On the other hand, if the taking of the land by the United States for public use in violation of the treaty had been without the authority of Congress, the taking would have been unlawful and appellant would have had a cause of action for breach of treaty. If, however, Congress subsequently ratified the unlawful taking, that ratification would have related back to the original unlawful taking and made it a lawful and rightful taking *ab initio* under the power of eminent domain and would have thereby eliminated appellant's cause of action for breach of treaty and substituted therefor a cause of action for just compensation. *Crozier* v. *Krupp*, 224 U. S. 290, 305; *Shoshone Tribe of Indians* v. *United States*, 299 U. S. 476, 496. It is therefore clear that when appellant prosecuted the former suit for the appropriation of its land, it either had a cause of action for an unlawful taking or a cause of action for a lawful taking, but not both.

This brings us to the next major and, we believe, the crucial issue in this case of whether this court in the former case had jurisdiction under the special act to award just

compensation for the taking of appellant's Fort Laramie treaty land.

In the former case appellant contended the land had been wrongfully taken and this court stated that it had jurisdiction to award damages for a wrongful taking. The appellant contends that this statement meant the court's jurisdiction was limited to awarding such damages. That is not correct. Since it was not requested it was unnecessary for this court to determine whether it also had jurisdiction to award just compensation.

The pertinent portion of the special jurisdictional act under which the prior case was adjudicated provided:

> *Be it enacted* * * * That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate, and render judgment in any and all claims arising under or growing out of the Treaty of Fort Laramie of September 17, 1851 (Eleventh Statutes, page 749), between the Government of the United States and the Assiniboine Indian Nation, and other Indian nations therein specified; and the treaty of October 17, 1855 (Eleventh Statutes, page 657), between the Government of the United States and the Blackfeet Indian Nation and other Indian nations therein specified; or any subsequent Act of Congress, treaty, agreement or Executive order, or treaty with any other Indian tribe or any nation that violates any of the treaty rights of the Assiniboine Indian Nation which the said Assiniboine Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States; and jurisdiction is hereby conferred upon the said courts to determine whether or not any provision in any such treaty has been violated or breached by the Government of the United States by Acts of Congress or otherwise, and if so, to render judgment for the damages resulting therefrom. * * *
>
> SEC. 4. *That if it be determined by the court that the United States, in violation of the terms and provisions*

> *of any Executive order, law, treaty, or agreement, set forth and referred to in section 1, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation* or disposal, together with any interest thereon which may have accrued by virtue of the failure or delay of the United States to pay over to or employ for the benefit of the Assiniboine Indian Nation or Tribe, moneys so required to be paid or employed by any Act of Congress, at the rate of interest provided by such Act or Acts of Congress; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Assiniboine Indians in and to such money or other property. * * * [Emphasis supplied.]

Senate Report No. 351, 69th Cong., 1st Sess., p. 1, and House Report No. 952, 69th Cong., 1st Sess., p. 2, accompanying this bill are enlightening. They state in part:

> * * * This bill is drafted in broad language to permit of a final adjudication of all the claims of the Assiniboine Indians. The committee is convinced that it is advisable from the standpoint of promoting good feeling among the Indians, to provide for a final adjudication of all their claims. * * * This bill is designed to clearly give to the Court of Claims authority to adjudicate any claims for violation of treaties made with the Assiniboine Indians and to render judgment for damages resulting therefrom. * * *

When construed in light of the legislative history there is no doubt that the Act conferred jurisdiction on this court to adjudicate all claims arising from the violation by the United States of any of appellant's property rights which had been given to it by any treaty, Act of Congress, or executive order regardless of whether the right was rightfully or wrongfully violated.

The prior case of this plaintiff in this court was decided early in 1933. It was at that time and is now a well-settled principle of constitutional law that when the United States, in exercising the power of eminent domain, takes private property for public use, the owner is not only entitled to the value of the property at the time of the taking, but also, if the taking precedes the payment of compensation, to such additional amount as will produce the full equivalent of that value paid contemporaneously with the taking, and a reasonable rate of interest is usually the method employed to ascertain this additional amount. *Seaboard Air Line Ry. Co.* v. *United States,* 261 U. S. 299, 306; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Phelps* v. *United States,* 274 U. S. 341, 344; *Jacobs* v. *United States,* 290 U. S. 13, 16-17; *United States* v. *Creek Nation,* 295 U. S. 103, 111; *Shoshone Tribe of Indians* v. *United States, supra; United States* v. *Klamath and Moadoc Tribes of Indians, et al.,* 304 U. S. 119, 123; *Blackfeet and Gros Ventre Tribes of Indians* v. *United States,* Appeals Docket No. 2-53 (decided March 2, 1954), and the cases cited therein.

The appellant's argument that this court's jurisdiction was limited to adjudicating only those claims that arose from an unlawful taking of its land is predicated on Section 4 of the special jurisdictional act. It argues that this court could not have awarded just compensation because Section 4 specifically confined the amount of damages to be recovered for any property unlawfully appropriated to the value of the property at the time it was taken. It also points out that the bill as it originally passed the House and Senate contained a provision allowing interest on the value of the property unlawfully appropriated and that this provision was eliminated. It also relies on the Statement of the House managers attached to the Conference Report which stated:

> • • • The House and Senate conferees have agreed upon language which will be a saving to the Government over the provision heretofore adopted by both Houses. It eliminates the payment of interest on all funds that may be recovered by the Indians but pro-

> vides for the payment of interest on those items which carried interest when authorized by Congress and which have been withheld from the tribe. Interest would have been recovered on these funds had they been kept intact for the tribe. [68 Cong. Rec. 4252 (1927)].

Section 4 had nothing to do with the type of claims that would have been presented but it is clear from Section 4 and this statement that Congress intended to confine damages for the land *unlawfully appropriated* by the United States to the value of the land at the time of the appropriation. There are two additional points that should be noted with respect to this limitation on the allowance of interest. First, it is a limitation on the allowance of interest as such and not a limitation on interest or its equivalent as a part of just compensation. Second, the last sentence that is quoted above in the Statement of the House managers epitomizes the purpose for giving interest or its equivalent as a part of just compensation.

The Supreme Court's interpretation in *United States* v. *Klamath and Moadoc Tribes of Indians, supra,* of almost identical language in a similar jurisdictional act (41 Stat. 623) is persuasive in this case. In that case the jurisdictional act provided:

> SEC. 3. *That if it be determined by the Court of Claims in the said suit herein authorized that the United States Government has wrongfully appropriated any lands belonging to the said Indians, damages therefor shall be confined to the value of the said land at the time of said appropriation,* and the decree of the Court of Claims with reference thereto, when satisfied, shall annul and cancel all claim and title of the said Indians or any other tribe or band of Indians in and to said lands, as well as all damages for all wrongs and injuries, if any, committed by the Government of the United States with reference thereto. [Emphasis supplied.]

After holding the land had been taken under the power of eminent domain, the Supreme Court said that this limita-

tion pertained only to lands *wrongfully appropriated* and therefore did not bar the allowance of interest or its equivalent as a part of just compensation because the taking under the power of eminent domain was a *rightful appropriation.*

The fact that the Act did not specifically provide for interest as a part of just compensation did not present an insuperable obstacle, because it is well established that where the jurisdictional act is silent as to interest or its equivalent as a part of just compensation, that interest or its equivalent should be allowed as a part of just compensation in Indian as well as ordinary cases. *Seaboard Air Line Ry. Co.* v. *United States, supra; Brooks-Scanlon Corp.* v. *United States, supra; Phelps* v. *United States, supra; Jacobs* v. *United States, supra; United States* v. *Creek Nation, supra; Shoshone Tribe of Indians* v. *United States, supra; United States* v. *Klamath and Moadoc Tribe of Indians et al., supra; Blackfeet and Gros Ventre Tribes of Indians* v. *United States, supra.*

We therefore conclude that if the land had been taken under the power of eminent domain this court had jurisdiction in the former case to award just compensation. Both parties agree that the special jurisdictional act gave this court jurisdiction to award damages if the land had been unlawfully taken.

It is unnecessary to decide whether appellant's land was taken under the power of eminent domain because in any event appellant had but one cause of action for the taking of the same land and that cause of action was prosecuted in the former case on the merits and judgment was rendered thereon.

The value of the land at the time it was taken has been judicially determined and the award properly satisfied by allowable offsets, according to law. If the land had been *unlawfully* taken, interest could not have been allowed on that value under the law as it existed when the prior suit was brought, nor can it be allowed under the law in existence today. (Rev. Stat. Sec. 1091; 36 Stat. 1141, as amended (Judicial Code Sec. 177); 28 U. S. C. Sec. 2516); *United States* v. *Goltra et al.*, 312 U. S. 203, and the cases

cited therein. If the Fort Laramie treaty land had been taken under the power of eminent domain appellant could have demanded and recovered interest or its equivalent as a part of just compensation but its failure to so demand and recover does not prevent the application of the rule of *res adjudicata*. As we read the statutes and their histories as to legal claims the application of that rule is required. *Blackfeet and Gros Ventre Tribes of Indians* v. *United States, supra*, and the cases cited therein. This case is not a separate and distinct claim, but is a part of a prior claim tried and adjudicated. Cf. *Twin Cities Properties, Inc.* v. *United States*, 90 C. Cls. 119, 125-128. Therefore, since this court had jurisdiction, the judgment, having been upon the merits, is an absolute bar to further litigation between the same parties, not only in respect to every matter which was actually advanced to support the prior claim, but also as to every matter which could have been advanced in connection with that claim. *Cromwell* v. *County of Sac*, 94 U. S. 351; *Blackfeet and Gros Ventre Tribes of Indians* v. *United States, supra; Western Cherokee Indians* v. *United States*, 116 C. Cls. 665, *cert. denied* 340 U. S. 904; *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 390, *cert. denied* 312 U. S. 695; *Cook and Co.* v. *United States*, 80 C. Cls. 708; *International Curtis Marine Turbine Co.* v. *United States*, 74 C. Cls. 132.

The appellant cannot point to any provision in the Act of August 13, 1946, which supports its claim, but relies solely upon the contention that the legislative history of the Indian Claims Commission Act, *supra*, establishes its right to have this court again adjudicate the present claim. In our opinion the appellee correctly points out that Section 2 (60 Stat. 1050) of the Act clearly bars the claim. That section provides:

> SEC. 2. * * * All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but *all other defenses shall be available to the United States.* [Emphasis supplied.] [25 U. S. C. 70a.]

The appellant has had its day in court and its claim for the taking of its land to which the treaty gave it a beneficial

ownership has been adjudicated on the merits. The court found in the prior case that the land had been set apart for the Assiniboine Tribe by a treaty and had subsequently been appropriated by the United States. For that appropriation, we awarded compensation. For the reasons set forth in *Blackfeet and Gros Ventre Tribes of Indians* v. *United States, supra,* we reaffirm the holding that the Act of August 13, 1946, *supra,* and its legislative history permit the defense of *res adjudicata* and therefore appellant cannot revive or reopen the former case to request additional or different relief, if such relief could have been granted in the prior case.

The appellant further contends that the Indian Claims Commission Act, *supra,* changed the law thereby creating an altered situation and preventing the application of the doctrine of *res adjudicata.* The appellant argues that the Indian Claims Commission Act, *supra,* changed the law because it gives the Commission jurisdiction to hear and determine claims arising under the Constitution, whereas the special act under which the former Assiniboine case was tried did not expressly give this court jurisdiction to award just compensation. This contention is without merit because the Indian Claims Commission Act, *supra,* did not in any way change the law in this respect, inasmuch as this court had jurisdiction to and could have awarded just compensation in the former case, under the special jurisdictional act if the taking had been under the power of eminent domain. Just compensation was in other cases awarded where the statute did not expressly so provide.

The appellant also contends that *res adjudicata* is not a defense to its present claim because intervening decisions have created an altered situation. This contention is predicated on the erroneous assumption that appellant had two separate causes of action for the taking of the same land. All of the cases cited by appellant with respect to *res adjudicata* and intervening decisions deal with the effect of the collateral estoppel branch of the rule on a separate cause of action and therefore have no bearing on this case.

Moreover, we believe appellee correctly states that before and after appellant's former suit the Supreme Court had

consistently held that land granted by the United States to Indian tribes by treaty represented a property right protected by the Constitution and that the taking of such property right under the power of eminent domain required the payment of just compensation. *Lane* v. *Pueblo of Santa Rosa,* 249 U. S. 110; *Yankton Sioux Tribe* v. *United States,* 272 U. S. 351; *United States* v. *Creek Nation, supra; Shoshone Tribe of Indians* v. *United States, supra; United States* v. *Klamath and Moadoc Tribes of Indians et al., supra.*

In addition to what has been said and the cases cited, there are other reasons which, in our opinion, support the claim that the prior decision of this court is a bar to the claim now presented and urged by plaintiff for further recovery, and we think the Indian Claims Commission was correct in so holding. It has been argued several times in cases involving the defense of *res adjudicata* that, in effect, the purpose of the Indian Claims Commission Act was to close out the claims of Indian Tribes, Bands, or Identifiable Groups of American Indians for ancient wrongs, real or supposed, so that the Indians would ultimately go out and become a part of the great body of citizens, instead of holding on to their tribal status under the impression that otherwise they would lose their right to assert these tribal claims; and, that such act created a new or changed climate with respect to Indian Claims and litigation with respect thereto.

It may be admitted that this is true to some extent, and the statute makes that perfectly obvious, but the provisions of the act and its legislative history make it equally obvious, we think, where Congress intended that that changed condition should stop. When the Act and its history, including the hearings before the Committees on Indian Affairs of the House and Senate, are carefully studied it will be seen that the departure from the normal situation existing in litigation in general; the right to sue the United States, and the basis of such suits, is found only in clauses (2) (3) (4) and (5) of the act. Clause (1) of the Act is the *only* clause upon which this claim is based, and indeed, the only clause upon which it could be based, or predicated

because it is a claim "in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President." Thus it will be seen that the only thing the Indian Claims Commission Act did, or the only change it made with respect to jurisdictional acts which had been passed, insofar as the class or character of claims such as the one now before us is concerned, was to grant to Indian Tribes or "other Identifiable groups" the right to sue on such legal or equitable claims, before the Indian Claims Commission until a certain time, with the right of appeal to this court and the Supreme Court, and thereafter to sue on such legal claims in this court without the necessity of special acts in each case. But we think it is clear that in doing this no change was made or intended in substantive law with reference to such claims and that Congress intended that there should be no such change. The statute does not so state and nothing was brought to the attention of the Congress before the act was enacted which would justify us in inferring that the Congress so intended when the statute was enacted.

If Indian Tribes should be permitted to open up and relitigate, in whole or in part, claims which have been heard, considered and determined on their merits by this court, then Congress should provide for this. It should not be done by judicial legislation.

The nature and character of Indian claims arising under clause (1) of the Indian Claims Commission Act should not be confused with the kinds of claims that may be presented for determination by the Commission or by this court under clauses (2), (3), (4), and (5). As to the latter class of claims, which marked the real departure by Congress from the normal situation previously existing in Indian litigation, there was clearly a real departure from prior practice and procedure, and it is perfectly clear from the provisions of the act and its history that this was intended for the purpose of closing out tribal claims for ancient wrongs, real or supposed. However, as to claims arising under the Constitution, acts of Congress, agreements or Executive orders of the President, we think it is equally clear that the Congress intended that there should be no radical

change (and refusal to apply the defense of *res adjudicata* would be a radical change) in the ordinary rules of law or that there should be a change in the climate of Indian litigation.

A careful examination of the hearings before the Indian Claims Committee of the House of Representatives and the Senate will disclose that certain persons, who were interested in the matter of reopening and relitigating claims that had previously been before this court, sought to have a provision inserted in the act permitting this to be done, and the Committee refused to do this.

We must interpret and apply the act as it was finally written and voted upon by the members of the House and the Senate, and not according to a statement or report which may have been inserted in the Appendix of the Congressional Record by only a few members of the House after the bill had been voted upon and Congress had adjourned.

The rule of *res adjudicata* is clearly a defense available to the United States under Senate Amendment No. 5 to the House bill, and we think it is a defense that the Congress intended should be made in cases which had theretofore been litigated to final judgment on "legal or equitable claims"; otherwise, practically all of the decisions of this court in prior cases would have gone for naught. There was some doubt under the bill as it had passed the House, as to the defenses which the United States might interpose to claims by Indian Tribes, and the Senate wrote into the bill the provision as to defenses which the United States might make in such suits, with this explanation:

> It is understood that the bill as it passed the House was intended to permit all defenses to the Government except the plea of the statute of limitation or laches, and as amended this is made clear in the bill.

The statement of the House Managers on H. R. 4497 stated:

> Amendment No. 5: The House bill provided that no claim should be considered by the Commission where a final determination of such claim had already been

made on the merits. The Senate Amendment, made upon recommendation of the Department of Justice provided that all defenses, except statutes of limitation and laches, should be available to the United States. This amendment was accepted by the conferees. It is implicit, however, from the purpose, history, and language of the entire bill, that this amendment does not permit the government to plead as a defense to any of the five enumerated classes of claims that such facts constitute only a political and not a justiciable wrong for the bill expressly makes such wrong justiciable by authorizing suit thereon. As stated in the Senate Report, this amendment does not permit the raising of legal defenses in cases based on standards of "fair and honorable dealings," for the bill expressly authorizes suit on such claims. Nor is this amendment intended to preclude the adjudication by the Commission of any claim authorized to be heard and determined under this section which has not been in fact previously adjudicated or settled on its merits, or as to which it has been previously held that the court had no judicial power to determine.

The Indian Claims Commission Act of August 13, 1946, is special legislation for the benefit of a particular class, just as jurisdictional acts waiving the statute of limitation, etc., and permitting suits had been in the past. In the case of *Sioux Tribe* v. *United States,* 97 C. Cls. 613, 665, this court said:

> The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown. The court may not enlarge its liability beyond what the language of the act requires. *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686; *Blair* v. *City of Chicago,* 201 U. S. 401, 470-473; *Bridge Company* v. *United States,* 105 U. S. 470, 480-484. When Congress has desired to open up claims, as a result of its action taken pursuant to a policy deemed to be for the welfare of the Indians, for consideration and adjudication *de novo* it has used language clearly indicating that purpose. *Choctaw Nation* v. *United States,* 119 U. S. 1, 2, 36-31, 35; *Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347, 348-350. While, in proper

cases, the rules of law which apply to the Government are, with a few exceptions growing out of public policy, the same as those which apply to individuals, public policy demands that the Government in its dealings with individuals should occupy an apparently favored position and consequently the equities which is as between individuals have, in the absence of waiver by Congress, but a limited application as between the Government and a citizen. *United States* v. *Verdier*, 164 U. S. 213, 218, 219.

The reason for the rule of strict construction as announced in the above-cited cases is that "it serves to defeat any purpose concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." [See, also, *Boston Sand and Gravel Company* v. *United States*, 278 U. S. 41, 48.]

In interpreting and applying clause (1) of the Act and the provision with reference to the defenses available to the United States in cases arising under the statute, we should be governed by the language of the act, its purpose, and, so far as its history is concerned, by what the membership of the House and the Senate knew about such history through hearings, reports of Committees, etc., made and submitted before the bill was voted upon. Since the rule of *res adjudicata* is a well-recognized rule of law applicable in cases of this kind, we may not speculate as to what Congress might have done if a case such as this had been brought to the attention of Congress during the consideration of the bill, or if the statement of certain members of the Committee on Indian Affairs of the House, printed in the Appendix of the Congressional Record after the bill had been voted upon, had been expressly brought to the attention of that body during the debate upon and consideration of the bill. *Sioux Tribe* v. *United States, supra.*

Since this case presents an attempt on the part of appellant to relitigate a legal claim under clause (1) of the Indian Claims Commission Act previously before this court within its jurisdiction, and which was fully heard and determined on the questions and issues presented, we are of the opinion that there does not exist, merely because this

is an Indian case, any more justification for relaxing or ignoring the principle of *res adjudicata* than there would be in other litigation generally. *Electric Boat Company* v. *United States,* 66 C. Cls. 333; *Electric Boat Company* v. *United States,* 81 C. Cls. 361, 367, 368; *Pacific Railroad Company* v. *United States,* 158 U. S. 118.

Judgments of this court not appealed and which stand unmodified are as final and conclusive as are the judgments of the Supreme Court, and may not be reopened for retrial or modification without clear and express authority of Congress. *Allen Pope* v. *United States,* 323 U. S. 1. This is implicit in Sections 285 and 286, U. S. Code, Title 28 (Act of March 3, 1863, 12 Stat. 766; March 3, 1911, 36 Stat. 1141), which provide as follows:

> 285. The payment of any amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.
>
> 286. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

In the prior case of the *Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347, this court, as hereinbefore stated, found the 6,477,940 acres of treaty lands of the tribe had been appropriated by the United States, and we made and entered an award to the tribe of $3,238,970. As required by the statute we considered, determined and adjudicated, on the evidence submitted, defendant's statutory claim for payments made to the tribe by defendant on account of the tribe's claim, and for gratuitous expenditures made by the United States for the benefit of the tribe without treaty obligation, and found that such payments and gratuities made and expended by the United States amounted to $4,227,474.56, an amount which was in excess of the judgment for the tribe. As also required by the

statute (28 U. S. C. 250) we applied the payments and gratuities expended by the United States against the award or judgment in favor of the tribe, and after doing so, found that no net amount was due from the United States to the Assiniboine Tribe. This resulted in as an effective payment by the United States of the award and judgment of $3,238,970 in favor of the tribe within the meaning of the above-quoted sections, as if such award had been reported by the President to Congress and paid by that body through an appropriation in the usual course in such cases. This is so for the reason that Congress has expressly directed that judgments of the Court be satisfied by counterclaims in the following provision in 28 U. S. C. 250, which first appeared in section 3 of the Act of March 3, 1863, 12 Stat. 765:

> All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: * * *

If Congress intended that Indian cases which had been heard, determined and adjudicated fully on the merits of the questions and issues presented, should be reopened and relitigated, it should have so provided in language sufficiently clear not to be misunderstood. If cases such as this should be reopened and again heard and adjudicated, it is for Congress rather than the courts to so provide. *Pacific Railroad Co.* v. *United States, supra; Allen Pope* v. *United States, supra.*

We therefore conclude that the rule of *res adjudicata* is a bar to appellant's claim in this appeal. The final determination of the Indian Claims Commission sustaining the motion of the United States for summary judgment and dismissing appellant's amended petition is affirmed.

It is so ordered.

WHITAKER, *Judge;* and JONES, *Chief Judge,* concur.

MADDEN, *Judge,* dissenting:

For the reasons which I gave in dissenting from the opinion of the court in *Blackfeet and Gros Ventre Tribes of*

Indians, App. Docket No. 2-53, decided March 2, 1954, I respectfully dissent.

Judge LARAMORE took no part in the consideration or decision of this case.

THE ACT OF CONGRESS OF MARCH 2, 1927 (44 STAT. 1283) UNDER WHICH THE FORMER CASE WAS DECIDED.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States, by either party, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate, and render judgment in any and all claims arising under or growing out of the Treaty of Fort Laramie of September 17, 1851 (Eleventh Statutes, page 749), between the Government of the United States and the Assiniboine Indian Nation, and other Indian nations therein specified; and the treaty of October 17, 1855 (Eleventh Statutes, page 657), between the Government of the United States and the Blackfeet Indian Nation and other Indian nations therein specified; or any subsequent Act of Congress, treaty, agreement or Executive Order, or treaty with any other Indian tribe or any nation that violates any of the treaty rights of the Assiniboine Indian Nation which the said Assiniboine Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States; and jurisdiction is hereby conferred upon the said courts to determine whether or not any provision in any such treaty has been violated or breached by the Government of the United States by Acts of Congress or otherwise, and, if so, to render judgment for the damages resulting therefrom.

"Sec. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this Act, and such suit shall make the Assiniboine Nation or Tribe party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Assiniboines approved by

the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

"Sec. 3. That if any claim or claims be submitted to said court it shall determine the rights of the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made by the United States upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as a set-off in any suit; and the United States shall be allowed credit subsequent to the date of any Executive order, law, treaty or agreement under which the claims arise for any sum or sums heretofore paid or expended for the benefit of said Indians, including gratuities.

"Sec. 4. That if it be determined by the court that the United States, in violation of the terms and provisions of any Executive order, law, treaty, or agreement, set forth and referred to in section 1, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with any interest thereon which may have accrued by virtue of the failure or delay of the United States to pay over to or employ for the benefit of the Assiniboine Indian Nation or Tribe, moneys so required to be paid or employed by any Act of Congress, at the rate of interest provided by such Act or Acts of Congress; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Assiniboine Indians in and to such money or other property.

"Sec. 5. Upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and deter-

mine a reasonable fee, not to exceed 10 per centum of the recovery, together with all necessary and proper expenses incurred in preparation and prosecution of the suit, to be paid to the attorneys employed by the said tribe or nation of Indians, and the same shall be included in the decree and shall be paid out of any sum or sums found to be due said tribe.

"Sec. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any other tribe or band of Indians deemed by it necessary or proper to the final determination of the matters in controversy.

"Sec. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case.

"Sec. 8. The proceeds of all amounts, if any, recovered for said Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 4 per centum per annum from the date of the judgment or decree. The costs incurred in any suit hereunder shall be taxed against the losing party, if against the United States such costs shall be included in the amount of judgment or decree, and if against said Indians shall be paid by the Secretary of the Treasury out of the funds standing to their credit in the Treasury of the United States: *Provided*, That actual costs necessary to be incurred by the Assiniboine Indians as required by the rules of court in the prosecution of this suit shall be paid out of the funds of the Assiniboine Tribe in the Treasury of the United States."

INDIAN CLAIMS COMMISSION ACT.

[PUBLIC LAW 726—79TH CONGRESS]
[CHAPTER 959—2D SESSION]
[H. R. 4497]

AN ACT

To create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian

Claims Commission, hereafter referred to as the Commission.

JURISDICTION

SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds

that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

MEMBERSHIP APPOINTMENT; OATH; SALARY

SEC. 3. (a) The Commission shall consist of a Chief Commissioner and two Associate Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate, and each of whom shall receive a salary of $10,000 per year. At all times at least two members of the Commission shall be members of the bar of the Supreme Court of the United States in good standing: *Provided further,* That not more than two of the members shall be of the same political party. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office.

TERM OF OFFICE; VACANCIES; REMOVAL

(b) The Commissioners shall hold office during their good behavior until the dissolution of the Commission as

hereinafter provided. Vacancies shall be filed in the same manner as the original appointments. Members of the Commission may be removed by the President for cause after notice and opportunity to be heard.

NOT TO ENGAGE IN OTHER VOCATIONS OR REPRESENT TRIBES

(c) No Commissioner shall engage in any other business, vocation, or employment during his term of office nor shall he, during his term of office or for a period of two years thereafter, represent any Indian tribe, band, or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subdivision shall be fined not more than $10,000 or imprisoned not more than two years, or both.

QUORUM

(d) Two members shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and, if there be a quorum, no vacancy shall impair or affect the business of the Commission, or its determinations.

STAFF OF COMMISSION

SEC. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the business of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Commission in the performance thereof.

OFFICES

SEC. 5. The principal office of the Commission shall be in the District of Columbia.

EXPENSES OF COMMISSION

SEC. 6. All necessary expenses of the Commission shall be paid on the presentation of itemized vouchers therefor approved by the Chief Commissioner or other member or officer designated by the Commission.

TIME OF MEETINGS

SEC. 7. The time of the meetings of the Commission shall be prescribed by the Commission.

RECORD

SEC. 8. A full written record shall be kept of all hearings and proceedings of the Commission and shall be open to public inspection.

CONTROL OF PROCEDURE

SEC. 9. The Commission shall have power to establish its own rules of procedure.

PRESENTATION OF CLAIM

SEC. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

TRANSFER OF SUITS FROM COURT OF CLAIMS

SEC. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: *Provided*, That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: *Provided further*, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim

based upon fair and honorable dealings arising out of the subject matter of any such suit.

LIMITATIONS

SEC. 12. The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

NOTICE AND INVESTIGATION

SEC. 13. (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

(b) The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The Division shall make a complete and thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians concerned and to any interested Federal agency any data in its possession relating to the rights and claims of any Indian.

CALLS UPON DEPARTMENTS FOR INFORMATION

SEC. 14. The Commission shall have the power to call upon any of the departments of the Government for any information it may deem necessary, and shall have the

use of all records, hearings, and reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business.

At any hearing held hereunder, any official letter, paper, document, map, or record in the possession of any officer or department, or court of the United States or committee of Congress (or a certified copy thereof), may be used in evidence insofar as relevant and material, including any deposition or other testimony of record in any suit or proceeding in any court of the United States to which an Indian or Indian tribe or group was a party, and the appropriate department of the Government of the United States shall give to the attorneys for all tribes or groups full and free access to such letters, papers, documents, maps, or records as may be useful to said attorneys in the preparation of any claim instituted hereunder, and shall afford facilities for the examination of the same and, upon written request by said attorneys, shall furnish certified copies thereof.

REPRESENTATION BY ATTORNEYS

SEC. 15. Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any

case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U. S. C., sec. 476), shall be selected pursuant to the constitution and bylaws of such tribe, band, or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 2103 to 2106, inclusive, of the Revised Statutes (25 U. S. C., secs. 81, 82-84).

The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof.

NO MEMBER OF CONGRESS TO PRACTICE BEFORE COMMISSION

SEC. 16. No Senator or Member of or Delegate to Congress shall, during his continuance in office, practice before the Commission.

HEARING

SEC. 17. The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the Territory of Alaska.

TESTIMONY

SEC. 18. Any member of the Commission or any employee of the Commission, designated in writing for the purpose by the Chief Commissioner, may administer oaths and examine witnesses. Any member of the Commission may require by subpoena (1) the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States or Alaska at any designated place of hearing; or (2) the taking of depositions before

any designated individual competent to administer oaths under the laws of the United States or of any State or Territory. In the case of a deposition, the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall be subscribed by the deponent. In taking testimony, opportunity shall be given for cross-examination, under such regulations as the Commission may prescribe. Witnesses subpenaed to testify or whose depositions are taken pursuant to this Act, and the officers or persons taking the same, shall severally be entitled to the same fees and mileage as are paid for like services in the courts of the United States.

FINAL DETERMINATION

SEC. 19. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reason for its findings and conclusions.

REVIEW BY COURT OF CLAIMS

SEC. 20. (a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the de-

termination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C. sec. 288), as amended.

REPORT OF COMMISSION TO CONGRESS

SEC. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims; and (3) a statement of how each Commissioner voted upon the final determination of the claim.

EFFECT OF FINAL DETERMINATION OF COMMISSION

SEC. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been

filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

DISSOLUTION OF THE COMMISSION

SEC. 23. The existence of the Commission shall terminate at the end of ten years after the first meeting of the Commission or at such earlier time after the expiration of the five-year period of limitation set forth in section 12 hereof as the Commission shall have made its final report to Congress on all claims filed with it. Upon its dissolution the records of the Commission shall be delivered to the Archivist of the United States.

FUTURE INDIAN CLAIMS

SEC. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and

to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C., sec. 250), as amended: *Provided, however,* That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups.

EFFECT ON EXISTING LAWS

SEC. 25. All provisions of law inconsistent with this Act are hereby repealed to the extent of such inconsistency, except that existing provisions of law authorizing suits in the Court of Claims by particular tribes, bands, or groups of Indians and governing the conduct or determination of such suits shall continue to apply to any case heretofore or hereafter instituted thereunder save as provided by section 11 hereof as to the deduction of payments, offsets, counterclaims, and demands.

SEC. 26. If any provision of this Act, or the application thereof, is held invalid, the remainder of the Act, or other applications of such provisions, shall not be affected.

Approved August 13, 1946.

60 Stat. 1049.

OPINION OF THE INDIAN CLAIMS COMMISSION.

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 62

THE ASSINIBOINE INDIAN TRIBE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Decided: December 12, 1952.

Appearances: *Louis A. Gravelle, Douglas Whitlock, Edward F. Howrey,* and *Davies, Richberg, Beebe, Busick & Richardson, Attorneys for Plaintiff.*

Ralph A. Barney, with whom was *Mr. Assistant Attorney General Wm. Amory Underhill, Attorneys for Defendant.*

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

This claim comes before the Commission a second time. The first or original petition was filed herein on April 26, 1950, and thereafter, and on July 25, 1950, defendant filed its motion for summary judgment based upon the ground that the same case had been previously adjudicated on its merits by the Court of Claims in case No. J-31 and that its order of December 4, 1933, therein barred relitigation of the case before this Commission. The Commission by its order of April 27, 1951, sustained defendant's motion and dismissed the petition. Thereafter, plaintiff was granted a rehearing and permission to file an amended petition by order made on June 22, 1951, which set aside the order of April 27, 1951.

Pursuant to the order of June 22, 1951, the plaintiff, on July 18, 1951, filed its amended petition and defendant thereafter filed its motion for summary judgment based upon the same ground as the first motion mentioned above. So the case is now before us on the amended petition, and the question to be determined is the effect of the former

judgment of the Court of Claims in the case, The Assiniboine Indian Tribe v. United States, J-31, 77 C. Cls. 347, it being conceded by both sides that the parties in the former case are the same as those now before this Commission and that in the former case compensation was sought for the identical land which is involved here and for which compensation is again prayed for.

Inasmuch as a determination of the question raised depends upon the issues before the Court of Claims in the former case and the cause of action pleaded in the amended petition in the present case, we shall set forth as briefly as possible the issues presented to and decided by the Court of Claims and those shown by the amended petition herein.

CASE BEFORE COURT OF CLAIMS

We shall first look at the Court of Claims determination of the case, Assiniboine Indian Tribe v. United States, No. J-31, 77 C. Cls. 347, which defendant pleads as a bar to our consideration of the pending claim. The Court of Claims, after fixing the damages at $3,238,970 and determining that the offsets exceed that sum, made its final order in that case as follows:

> "At a Court of Claims held in the City of Washington on the 4th day of December, A. D., 1933, judgment was ordered to be entered as follows:
>
> " 'Upon the special findings of fact, which are made part of the judgment herein, the Court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.' "

This order does not appear in the published reports of the Court of Claims. The original order was made on April 10, 1933, and the order quoted above followed an amendment of the findings of fact and therefore seems to be the last order determining the case. Anyway, the two orders, except as to dates, are identical.

The former case was for damages for the appropriation by defendant of a large area of land including the land involved in the claim here under consideration. The petition in that case (Amended and Supplemental Petition

filed in Court of Claims on July 23, 1930) alleges that the Assiniboine Indian Tribe by virtue of the treaty of Fort Laramie of September 17, 1851, 11 Stat. 749, acquired the right and title to the exclusive use and occupancy of the following described tract of land:

> Commencing at the mouth of the Yellowstone River, thence up the Missouri River to the mouth of the Musselshell River; thence from the mouth of the Musselshell River, following a direct line in a southeasterly direction to the mouth of the Powder River; thence down the Yellowstone River to the place of beginning. (Par. 8)

This description is substantially the same as that contained in Article 5 of the Fort Laramie treaty, and by its Finding No. VIII, the Court of Claims found the area to contain 6,477,940 acres of land of the value of $3,238,970 at the time it was appropriated by defendant. The plaintiff herein alleges (par. VI) that it acquired the same land under the same treaty and had the full and exclusive use and occupancy of same until taken by defendant.

As to the appropriation of the above-described lands, which will hereafter be referred to as the Fort Laramie lands, the manner in which they were taken will now be shown.

EXECUTIVE ORDER OF AUGUST 18, 1868

In the former case it was alleged (pars. 18, 19) that defendant, without the consent of plaintiff and notwithstanding the stipulations of the Fort Laramie treaty, through the Executive Order of August 18, 1868, established a military reservation for the use of defendant on the following lands:

> "The initial point is at the intersection of the 104° of longitude, west from Greenwich with the forty-eighth parallel of north latitude, thence run south fifteen miles, thence east fifteen miles, thence north thirty miles, thence west thirty miles, thence south thirty miles, thence east fifteen miles."

which military reserve unlawfully deprived plaintiff of about 150,000 acres of its Fort Laramie lands of the value of $187,500 and without compensating the Indians therefor.

The Court of Claims found (Finding IV) that a military reservation was set apart by said Executive Order of August 18, 1868, and included 169,574 acres of the Fort Laramie land.

In its amended petition (par. IX) plaintiff sets forth a like claim for the same lands taken for the military reserve by said Executive Order and alleges the value thereof to be $295,058.76, which sum, plus interest from date of taking, is said to represent the damages sustained by plaintiff, and claim is made therefor. It is also alleged that by act of Congress, dated May 19, 1900, these lands were made subject to disposal under the Homestead, Townsite and Desert Land laws.

EXECUTIVE ORDERS OF APRIL 13, 1875, AND JULY 13, 1880

In the former case the plaintiff pleaded (pars. 27, 29) that by the Executive Order of April 13, 1875, without the consent of plaintiff and in violation of the stipulations of the treaty of 1851, and without compensation, defendant unlawfully deprived the Assiniboine of the following described part of their Fort Laramie lands and added them to the reservation of the Gros Ventre, Piegan, Blood, Blackfeet and Crow Indians, to-wit:

> "Commencing at a point where a straight line drawn from the mouth of the Musselshell River to the mouth of the Powder River intersects the 47° parallel of north latitude; thence east with the said parallel to the south bank of the Yellowstone River, thence down and with the south bank of said river to the south boundary of the military reservation at Fort Buford; thence west along the south boundary of said military reservation to its western boundary; thence north along said western boundary to the south bank of the Missouri River; thence up and with the south bank of said river to the mouth of the Musselshell River; thence along the straight line drawn between the mouth of the Musselshell River to the mouth of the Powder River to the place of beginning."

And that said lands were appropriated to the use and benefit of defendant and consisted of about 6,500,000 acres of the value of $19,500,000.

The Court of Claims found (Finding VII) that the order included all the lands granted plaintiff by the Fort Laramie treaty except the portion lying south of the 47th parallel and that set apart for the military reserve. That court having in other findings found there were 169,574 acres in the military reserve (Finding IV), and 465,870 acres (Finding VIII) lying south of the 47th parallel, the part set over to the other Indians by the Executive order of April 13, 1875, would comprise 5,842,496 acres.

And it is pleaded in the former case (pars. 30, 31, 32) that pursuant to the Executive order of July 13, 1880, there was unlawfully taken from plaintiff, without plaintiff's consent, the following described part of the Fort Laramie lands:

> Beginning at a point where the south boundary of the Fort Buford military reserve intersects the right bank of the Yellowstone River; thence according to the true meridian west along the south boundary of said military reserve to its western boundary; thence continuing west to the right bank of the Missouri River; thence up and along said right bank, with the meanders thereof to the middle of the main channel of the Musselshell River; thence along a straight line drawn between the mouth of the Musselshell River and the mouth of the Powder River to its intersection with the 47° parallel of north latitude; thence east along said parallel to its intersection with the right bank of the Yellowstone River; thence down and along said right bank, with the meanders thereof, to the place of beginning.

which area was alleged to comprise about 5,000,000 acres of the value of about $15,000,000. And it is alleged therein that that area was appropriated by the United States to satisfy land grants to railroads, or was thrown open to public entry and settlement.

With respect to the area covered by this Executive order (1880), the Court of Claims found (Finding VIII) that the

greater portion of the land set apart by the April 13, 1875 Executive order, being the part lying south of the south line, extended, of the military reserve, and north of the 47th parallel, was opened to public entry. And in the same finding that court found that the part of the Fort Laramie land lying south of the 47th parallel comprised 465,870 acres which were not included in either the 1875 or 1880 Executive Orders; also, that no formal order was issued placing this area in the public domain and that there was no record of the disposition thereof, except that between August 19, 1882 and October 14, 1914, plats of surveys of these lands were filed in the General Land Office. And that by the orders and proceedings above described all of the land granted the Indians by the Fort Laramie Treaty was appropriated by the Government.

In the amended petition in the pending case there is set forth (par. X) the lands described in the Executive Orders of 1875 and 1880, as in the former case, and it is alleged that all thereof, amounting to 3,574,992 acres lying north of the 47th parallel, were taken by virtue of said Executive Orders of 1875 and 1880, and that those lands, and the lands lying south of the 47th parallel, 465,870 acres, were taken without compensation for public use and disposed of under the public land laws of the United States. It is further alleged that the value of these lands at the time of taking was $7,191,414.

As to the remaining Fort Laramie lands, that is, 2,267,504 acres not disposed of as above set forth, the plaintiff now alleges (par. VIII) that by act of July 2, 1864, 13 Stat. 365, Congress granted Fort Laramie lands to the Northern Pacific Railroad Company, and it is charged that "as a result of this statute and the construction of the railroad, the United States took approximately 2,267,504 of plaintiff's Fort Laramie Treaty lands for public use without compensation or consideration of any kind, and conferred title to such acreage on the Northern Pacific Railroad Co." And that such lands when so taken were of the value of $4,194,822.40, which amount, with interest from time of taking, they claim as damages.

In this way plaintiff now accounts for all the lands involved in the Executive Orders of 1875 and 1880 and the area lying south of the 47th parallel, the only difference between the determination of the Court of Claims and the allegations of the amended petition herein is as to the acreage which was restored to the public domain and the acreage obtained by the railroad, the court deciding that all (without specifying the acreage) was so disposed of.

An examination of the act of July 2, 1864 will show that only the fee to the lands granted by that act passed to the railroad and that Indian title, that is, the right of occupancy, remained in the tribe, for it is provided therein:

> "The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of said Indians, the Indian title to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this Bill."

This act was construed in the case, Buttz v. Northern Pacific Railroad Company, 119 U. S. 55, 30 L. ed. 334, wherein the Supreme Court said:

> At the time the Act of July 2, 1864, was passed, the title of the Indian Tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the Company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals.
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> In the grant to the Railroad Company now before us, Congress was not unmindful of the title of the Indians to the lands granted, and it stipulated for its

extinguishment by the United States as rapidly as might be consistent with public policy and the welfare of the Indians.

See United States v. Santa Fe, 314 U. S. 339, 86 L. ed. 260.

It is evident, therefore, that the Assiniboine lost no part of their lands by the railroad grant, for it only operated on the Fort Laramie lands when the Indian title thereto, that is, the right of occupancy, which is the only title they ever had, had been extinguished by defendant, and that was done, as shown above, by Executive or administrative action. In truth, no part of the lands lying north of the 47th parallel was taken from *plaintiff* for restoration to the public domain or to satisfy the railroad grant because those lands had been set over to other Indians by the Executive Order of 1875 and it was not until the Executive Order of 1880 that Indian title was extinguished and those lands became part of the public domain or made fully operative the railroad grant.

We have set forth above somewhat in detail the claim asserted in the former case, the action of the Court of Claims thereon, and the pleaded claim in the pending case, to show that the claim now asserted is the same as that submitted and adjudicated in the former case. In the former case, as we have shown above, the plaintiff sued for the appropriation by defendant of the lands it acquired by the Fort Laramie treaty; it alleged, and the court found (1) that it had Indian title to those lands, (2) that the lands were appropriated by defendant, without the consent of the Indians, and without compensation, by the Executive Orders of 1868, 1875, 1880, as to their lands lying north of the 47th parallel, and by administrative action as to their lands lying south of said parallel, and (3) that the lands so appropriated were of the value of $3,238,970 at the time of their appropriation, for which amount judgment was awarded.

As to the manner by which defendant appropriated the Fort Laramie lands, the Court of Claims, at page 371 of its opinion, made it very plain that they were taken by

the executive and administrative action just referred to, for it said:

> When the Fort Buford Military Reservation was established by the Executive order of August 18, 1868, a part of the Fort Laramie lands in the northeast corner thereof was taken thereby. Of the area set apart to this military reservation, about 163,125 [169,574] acres lay south of the Missouri River and within the lands ceded to the Assiniboine Nation by the Fort Laramie Treaty. On April 13, 1875, an Executive order was entered by which the greater portion of the tract ceded to plaintiff by the Fort Laramie Treaty was, in the terms of the order, "withdrawn from sale, and set apart as an addition to the present reservation of the Gros Ventre, Piegan, Blood, Blackfeet, and Crow Indians," and of the land included in this order about 5,865,990 acres lay within the boundaries of the land heretofore ceded by the Fort Laramie Treaty to the Assiniboines. The land that was taken for the Fort Buford Reservation and by the Executive order of April 13, 1875, included (with more) all of the land granted to the plaintiff by the Fort Laramie Treaty except a comparatively small portion south of the forty-seventh parallel. In July 1880, by an Executive order a part of the area affected by the Executive order of April 13, 1875, was restored to the public domain, and later and about 1882, the defendant surveyed and filed plats of the portion of the Fort Laramie land south of the forty-seventh parallel and thereafter either opened the land to settlement or donated it to the Northern Pacific Railroad. *In this way the Government disposed of all of the land granted to plaintiff by the Fort Laramie Treaty.* (Emphasis supplied)

It is quite plain that the claim stated in the amended petition before us is the identical claim pleaded and adjudicated in the former case. The parties are the same, the land involved is identical, the appropriations thereof by defendant were in the same manner as determined by the Court of Claims, and the relief sought is the same, namely, damages measured by the value of the land at the time taken. And it is equally plain that the Court of Claims

determined in the former case all issues now pleaded in favor of the plaintiff, particularly, ownership of the land, unlawful appropriation thereof, and the damages resulting therefrom. True, plaintiff now claims interest, so-called in addition to the value, but the allegations respecting interest do not create a different cause of action because such demand has to do with the measure of relief (Green v. Bogue, 158 U. S. 478, 39 L. ed. 1061), and, as will be shown, would attach automatically to an award for damages for property taken in eminent domain, whether pleaded or not. Nor do the allegations that the Fort Laramie lands were disposed of under the various land laws create a different cause of action, for they plead that they were appropriated by the same executive and administrative action as pleaded and determined in the former case. Had the subsequent disposal thereof under the land laws been considered a controlling fact, it could and should have been brought forward in the former case, for the Court of Claims and the plaintiff were well aware of such disposals since it was pleaded and determined that the lands not granted to the railroad became part of the public domain and were thereby thrown open to public entry and settlement—so we must assume such disposals were before the court and considered by it.

The most that can be said to distinguish the two claims is that by the second, the one now pending, plaintiff asks for more compensation for the lands lost by administrative and executive action.

The principle of res judicata is plainly stated in Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, as follows:

> * * * there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the

claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

To the same effect is Commissioner v. Sunnen, 333 U. S. 591, 92 L. ed. 898, and many other cases decided by the Supreme Court and the Court of Claims. Therefore, since the present case as pleaded is the identical claim asserted and decided in the former case, the judgment of the Court of Claims is a bar to our reconsidering it now, that is, it comes within the first branch of the rule quoted above. See, also, Southern Pacific Railroad Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 378; United States v. Moser, 266 U. S. 236, 241, 69 L. ed. 262, 264.

To overcome the bar of the former judgment, counsel for the Indians devoted much space in their brief, and time in their oral argument, to the proposition that subsequent to the Assiniboine decision there have been decisions of the Court of Claims creating an altered situation, and state in their brief "the Court of Claims was still of

the opinion on March 13, 1933, in rendering the decision in the Creek Nation case that interest was not to be included as a part of just compensation in Indian cases even though the Indian tribe had fee simple title." We find no support for this assertion, for five years before the Creek decision the court allowed interest as a part of just compensation (see Yankton Sioux v. U. S., 65 C. Cls. 427, decided April 16, 1928) in an Indian case. Anyway, the cases relied upon as showing an "altered situation" do not support plaintiff's proposition. The cases, Yankton Sioux v. United States, 272 U. S. 351, 71 L. ed. 294 (1926), Creek case, 295 U. S. 103, 79 L. ed. 1331, Shoshone case, 299 U. S. 476, 81 L. ed. 360, did, perhaps, for the first time allow interest as a part of just compensation in Indian cases, but they merely applied a long recognized principle of law, a principle first applied to an Indian case in the Yankton Sioux case, long before the Assiniboine decision. And see Cook & Co. v. United States, 80 C. Cls. 708, 711, in which the Court of Claims said:

> As a matter of law, this court in ordinary just compensation cases prior to the decision of the Supreme Court in the Seaboard Air Line case was of the opinion that under section 177 of the Judicial Code interest could not be included in the judgment. The *Seaboard Air Line case,* 261 U. S. 299, was decided by the Supreme Court March 5, 1923, and since then this court has included interest.

Section 177 of the Judicial Code referred to above is, of course, merely declaratory of the common law "traditional rule." North American etc. v. United States, 253 U. S. 330, 336; United States v. Thayer, 329 U. S. 585, 588.

The other cases relied on are mostly income tax cases of which the case, Commissioner v. Sunnen, 333 U. S. 591, 92 L. ed. 898, is typical. In that case it was held that each tax year is the "origin of a new liability and a separate cause of action," and that "a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that (prior) determination obsolete or erroneous, at least for future purposes."

Thus, the court held that an adjudication involving taxes for a particular year would not be res judicata as to any later proceedings involving taxes for subsequent years on the theory, as stated above, that each tax year constituted a "separate cause of action," but even then, the court held that the prior judgment acts as a collateral estoppel as to those matters in the prior proceeding which were actually presented and determined in the first. And further, the court said: "if a claim of liability or nonliability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving *the same claim and the same tax year.*" (Emphasis supplied). See, also, Art Metal v. United States, 82 C. Cls. 666, International Curtis Marine Turbine Co. v. U. S., 74 C. Cls. 132, and Chicago etc. v. United States, 80 C. Cls. 824. It seems plain from the above that the doctrine of collateral estoppel is only applicable when more than one cause of action may, from the nature of the liability, arise from the same transaction. The Cromwell and Sunnen cases are illustrative of the idea. And where there is but one liability, as is the case under consideration, namely, liability for the loss of land appropriated by the Government, we do not believe the cases cited by plaintiff are applicable.

It has been frequently decided that a judgment, as long as it remains unmodified, is effective whether the decision is right or wrong. Reed v. Allen, 286 U. S. 191, 76 L. ed. 1054; Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 71 L. ed. 1069; Chicago etc. v. Schendel, 270 U. S. 611, 70 L. ed. 757; United States v. Moser, 266 U. S. 236, 69 L. ed. 262, 264. So, even if we were to accept plaintiff's contention that the alleged facts show an eminent domain appropriation, the judgment would still be res judicata, since the failure to allow interest was simply an erroneous judgment and stands as a bar to relitigating the same question, unless of course, as plaintiff contends, the jurisdictional act prevented the allowance of interest as a part of just compensation.

This brings us to the really crucial question, which is whether the jurisdictional act limited the relief to that

of the Court of Claims granted, namely, the value of the lands at the time of their appropriation by defendant. In the former case, as we have stated, that court awarded plaintiff the sum of $3,238,970 for the lands and nothing for the delay in making payment. (Finding VIII). We discussed this judgment in our former opinion and decided it was a valid adjudication as to the value of the Fort Laramie land at the time it was appropriated by defendant. We are still of that opinion. Moreover, we believe that even under plaintiff's theory—that of "collateral estoppel"—the determination by the Court of Claims is res judicata as to value. Cromwell v. County of Sac, 94 U. S. 351, 24 L. ed. 195; Commissioner v. Sunnen, 333 U. S. 591, 92 L. ed. 898. This, then, narrows the inquiry to the question, namely, whether the Court of Claims could, under the jurisdictional act, have awarded plaintiff interest, not as such, but as a part of just compensation under the Fifth Amendment. The claim now asserted (figuring the interest at 5 per cent per annum, a rate commonly heretofore used) amounts to upwards of $11,500,000 for the interest claim alone.

JURISDICTION OF THE COURT OF CLAIMS

The jurisdictional act of March 2, 1927, 44 Stat. 1263, which governed the Court of Claims in the determination of the former case, insofar as applicable to this discussion, reads as follows:

> "Sec. 1. * * * to hear, examine, and adjudicate, and render judgment *in any and all claims arising under or growing out of the treaty of Fort Laramie of September 17, 1851* * * * between the Government of the United States and the Assiniboine Indian Nation, * * * or any subsequent act of Congress, treaty, agreement, or Executive order, or treaty with any other Indian tribe or any nation that violates any of the treaty rights of the Assiniboine Indian Nation * * *; and *jurisdiction is hereby conferred* upon the said courts to determine whether or not any provision in any such *treaty has been violated or breached* by the Government of the United States by acts of Congress or other-

wise, and if so, to render judgment for the damages resulting therefrom.

• • •

"Sec. 4. That if it be determined by the court that the United States, *in violation of the terms and provisions of any* Executive order, law, *treaty,* or agreement *set forth and referred to in section 1,* has *unlawfully* appropriated or disposed of any money or other property belonging to the Indians, *damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal.* • • •" (Emphasis added).

Following the passage of the above act, Congress on June 9, 1930, adopted Senate Joint Resolution No. 167, which in effect amended or supplemented said act, however, it applied to lands other than the Fort Laramie lands, so it has no bearing on this case.

A study of the Assiniboine jurisdictional act convinces us that Congress intended that the Court of Claims be empowered to adjudicate all claims involving appropriations of the Assiniboine lands granted them by the treaty of 1851. The act specifically empowers the court "to adjudicate, and render judgment in *any and all claims arising under or growing out of the Treaty of Fort Laramie of September 17, 1851.*" (Emphasis supplied). As stated in United States v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, "a case arising from or growing out of a treaty is one involving the rights given or protected by a treaty." Certainly the appropriation of the Fort Laramie lands involved rights given or protected by the 1851 treaty. Furthermore, the act expressly conferred upon said court jurisdiction "to determine whether or not any provision in any such treaty has been breached or violated" by defendant by "acts of Congress or otherwise, and if so, to render judgment for the damages resulting therefrom." (Sec. 1). These provisions define the court's powers and, as will be seen later when we discuss the plaintiff's specific objections to the jurisdictional act, the Court of Claims could have made an award for the appropriation of the Fort Laramie lands even though there had been no ex-

press authority to determine whether or not treaty rights had been violated by defendant.

Counsel for plaintiff press three reasons why the judgment of the Court of Claims is not a bar to relitigating the land claim. They are: (1) that under the jurisdictional act the court was confined to an award for the value of the land at the time of the appropriation and therefore could not allow interest as a part of just compensation under the Fifth Amendment; (2) that under the act it could only award damages for violation of treaty provisions, and (3) that it was only "unlawful appropriations" of land that could be adjudicated.

The act did not provide for interest and under the "traditional rule" none could be allowed. United States v. Tillamooks, 341 U. S. 48, 95 L. ed. 738. Moreover, its legislative history (set forth at pp. 9-11 of the plaintiff's brief) shows that Congress deliberately excluded the allowance of interest on any award the Court of Claims might make, and Sec. 4 of the act provided that the "damages therefor (the unlawful appropriation of plaintiff's property) shall be confined to the value of the * * * property at the time of such appropriation or disposal."

It may here be stated, the Indian Claims Commission Act does not provide for interest on its awards. Counsel for plaintiff say, however, that that act permits a recovery for property taken by eminent domain and that interest as a fair equivalent may be allowed in addition to the value of the property when appropriated. This is no doubt true.

It was decided as early as 1893 by the Supreme Court in Monongahela et al. v. United States, 148 U. S. 311, 37 L. ed. 463, that the courts were not concluded by legislative action in fixing amount to be paid for property taken by eminent domain. In this case, Congress authorized the condemnation of a lock and dam but expressly excluded from the amount to be paid therefor any amount for the owner's franchise to collect tolls which the taking of the lock and dam deprived it of. In considering this limitation the court said:

> We are not, therefore, concluded by the declaration in the Act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property.
>
> By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

And in Seaboard etc. v. United States, 261 U. S. 299, 67 L. ed. 664 (1923), the same court said:

> "Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * * and no specific command to include interest is necessary when interest or its equivalent is a part of just compensation."

See also Jacobs v. United States, 290 U. S. 13, 78 L. ed. 142; United States v. Rogers, 255 U. S. 163, 169, 65 L. ed. 566, 568.

Following the Monongahela and Seaboard Air Line cases, the Supreme Court decided in cases involving appropriations of Indian lands that the fact that the jurisdictional act made no provision for interest did not prevent an allowance of interest as a part of just compensation, because the traditional rule forbidding the allowance of interest against the government unless provided for by an appropriate statute or contract, does not apply to appropriations of property under the power of eminent domain since in such cases "the right to interest or a fair equivalent, attaches automatically to the right to an award for

damages." United States v. Creek Nation, 295 U. S. 103, 111, 79 L. ed. 1331, 1336; Shoshone Tribe v. United States, 299 U. S. 476, 497, 81 L. ed. 360, 369; Yankton Sioux v. United States, 272 U. S. 351, 359, 71 L. ed. 294, 298; United States v. Klamath, 304 U. S. 119, 123, 82 L. ed. 1219, 1222. Cf. United States v. Alcea Band of Tillamooks, 341 U. S. 48, 95 L. ed. 738.

And it is unimportant that Congress deliberately denied interest, as was the case in passing the Assiniboine jurisdictional act, for the same thing was done in the Shoshone case, supra, where the President vetoed a bill (68 Cong. Record, part 3, p. 2414) because it provided for interest, and the Congress thereafter passed a similar act with the interest provision eliminated. When the case was tried, the Court of Claims made an award for the value of the land taken but made no allowance for interest as part of just compensation. On review, the Supreme Court, in reversing the lower court, made these pertinent statements:

> "As pointed out already, the bill redrafted was understood to be identical with the first one except that the interest provision had been dropped to meet the President's objection.
>
> • • •
>
> "Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. United States v. Creek Nation, supra (295 U. S. 110, 111, 79 L. ed. 1335, 1336, 55 S. Ct. 681). Cf. Yankton Sioux v. United States, 272 U. S. 351, 359, 71 L. ed. 294, 298, 47 S. Ct. 142. Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages."

The principles stated in the Monongahela and Seaboard Air Line cases, supra—that Congress may not limit the relief for property taken under the power of eminent domain and that no specific command to include interest or its equivalent is necessary in such cases—underlies those Indian cases cited above in which the courts allowed in-

terest as a part of just compensation even though the jurisdictional acts were silent as to such allowance. So, under the authorities before cited, since the jurisdictional act permitted the Court of Claims to consider an appropriation of the Fort Laramie lands, taken in such a way as to require "just compensation" under the Fifth Amendment, as plaintiff now contends, the limitation of the jurisdictional act—that the damages "shall be confined to the value of the * * * property at the time of such appropriation or disposal"—was no impediment to that Court granting full relief, that is, a fair equivalent, such as interest, from the time of the appropriation, in addition to the damages it did allow.

As to the plaintiff's contention that a jurisdictional act, which permits an award for damages for breach of treaty rights does not permit an adjudication of eminent domain appropriations, we need but refer to Shoshone v. United States, 299 U. S. 476, 81 L. ed. 360; United States v. Creek, 295 U. S. 103, 79 L. ed. 1331. In each of those cases an adjudication of claims "arising under or growing out of treaties" was authorized and in neither was the court expressly empowered to award damages for violation of treaty obligations, as in the Assiniboine act; yet, in both there was an award for an appropriation of property by the United States, taken in violation of treaty rights of the Indians, and the awards in both were for just compensation, which included the equivalent of interest. The Shoshone case is particularly applicable here because the jurisdictional act there was to "adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe * * * may have * * * arising under or growing out of the treaty of July 3, 1868 * * *." No express power was granted to determine whether treaty provisions had been breached, as in the Assiniboine Act, yet the court held:

> "No cause of action can be vindicated thereunder unless such a cause of action * * * was already in existence. Under the jurisdictional act the court was to inquire whether the violation of the treaty of 1868 or some later act of Congress had given rise to legal or equitable grounds of liability."

So, it seems clear that the provisions of the Assiniboine act respecting the violation of treaty stipulations gave the court no more authority than it was otherwise given to adjudicate claims arising under or growing out of breach of provisions of the 1851 treaty; they but amplified the jurisdiction otherwise granted. The use of the term "legal and equitable claims" in the Shoshone Act did not qualify or abridge the court's power to consider treaty violations which might give rise to legal or equitable grounds for recovery. If anything, the Assiniboine Act is much broader as to jurisdictional powers since the words "legal and equitable" do not appear therein.

We pass now to the third proposition advanced by plaintiff. It is contended that since Section 4 of the Assiniboine jurisdictional act permitted recovery only for lands "unlawfully appropriated or disposed of" by defendant, no recovery could have been awarded for lands taken under the power of eminent domain, because such a taking is *not an unlawful taking*. Citing Klamath v. United States, 304 U. S. 119, 82 L. ed. 1219, and a number of other cases, which we have examined. It may be conceded that where the Government takes Indian or other property under Congressional authority or direction, such a taking being in the exercise of its sovereign power, therefore is not an unlawful appropriation of property and, it may be added, it makes no difference how the power is exercised, whether by condemnation proceedings, or without such formal proceedings, given the right to take property, the taking is lawful. Jacobs v. United States, 290 U. S. 13, 78 L. ed. 142.

The fundamental error of plaintiff's contention is in the position that the Fort Laramie lands were taken in a manner that constituted an eminent domain appropriation pursuant to Congressional authority. An examination of the authorities relied upon by plaintiff will show that in every case the taking of the property in question was pursuant to Congressional authority or direction. Take the Klamath case, for example: 87,000 acres of the Indians' land were given to another by an act of Congress in exchange for a larger area of lands belonging to the same tribe, which

had been previously taken from them. Without doubt the 87,000 acres were taken under the power of eminent domain, for Congress, by the act of June 21, 1906, 34 Stat. 325, authorized the exchange and, therefore, the appropriation of the lands was lawful, but in the case at bar there was no such taking shown by the facts in the former case, or by the allegations of the amended petition in the pending case, on the contrary, it plainly appears that the Fort Laramie land was taken by executive or administrative action. Thus, Congressional authority for the taking or ratification after the taking, a requisite to constitute a lawful taking, was absent. United States v. Goltra, 312 U. S. 203, 85 L. ed. 776. Where, however, the Government takes the property of another without previous Congressional authority or direction, the taking is considered, at least for jurisdictional purposes, wrongful and imposes upon the Government an implied duty to pay just compensation therefor by reason of the Fifth Amendment. The Shoshone and Creek cases, supra, show the difference between a lawful and an unlawful appropriation of Indian lands. In both, as plaintiff contends, and as the Supreme Court in the Goltra case, supra, said concerning them, the taking was unlawful (tortious). For unauthorized takings of non-Indian property, see Jacobs v. United States, 290 U. S. 13, 78 L. ed. 142; United States v. Lynch, 188 U. S. 445, 47 L. ed. 539; United States v. North American etc. Co., 253 U. S. 330, 64 L. ed. 935; Cress v. United States, 243 U. S. 316, 61 L. ed. 746. The Assiniboine land was not taken pursuant to legislative authority, as we have stated, and plaintiff does not plead it was, so the argument that the jurisdictional act in the former case did not permit an adjudication of "lawful takings" is of no avail since the facts now pleaded do not bring the case within the rule in the Klamath case or any of the others cited by plaintiff, where property was taken pursuant to specific Congressional action.

What we have said concerning the jurisdictional act of 1927 brings forward the rule against splitting a demand and prosecuting it piecemeal. This rule is plainly stated in Stark v. Starr, 94 U. S. 477, 24 L. ed. 276, thus:

> "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible." See also United States v. California and O. Land Co., 192 U. S. 355, 48 L. ed. 476; Baltimore v. Phillips, 274 U. S. 316, 71 L. ed. 1069.

The plaintiff here has actually now sued only for interest as a part of just compensation. In the former case, according to plaintiff, the interest item was not pressed. If this be so, and the jurisdictional act in the former case did not and could not, as we have stated, prevent such an allowance, under the authorities cited above, including those just cited, the bar of res judicata must be applied.

Plaintiff makes the point that there was no determination of the former case on the merits because the Court of Claims did not allow interest in addition to the value of the lands it awarded. In support of this assertion they refer to this language contained in a statement of the House Managers which was attached to the Conference Report (No. 2693, July 27, 1946, House) on H. R. 4497, which bill, as amended, became the Indian Claims Commission Act:

> "Nor is this amendment intended to preclude the adjudication by the Commission of any claim authorized to be heard and determined under this section which has not been in fact previously adjudicated or settled on its merits, or as to which it has been previously held that the court had no judicial power to determine."

This statement is in line with the well recognized rule, but, obviously it has no bearing upon cases that have been adjudicated on the merits or to cases as to which the

court has not held it has no judicial power to determine. In the case before us all ultimate substantive issues were determined by the Court of Claims in the former case under a jurisdictional act permitting full reparation for the lands unlawfully taken; if, as plaintiff now claims, full compensation (interest) was not allowed the plaintiff not having appealed, the judgment stands and is a bar to relitigating the same demand. Cf. United States v. McIntosh, 2 Fed. Supp. 244, 255; Cook v. United States, 80 C. Cls. 708.

Under the caption, "Res judicata is no defense where there has been a change in the law," plaintiff contends that the Indian Claims Commission Act has changed the law and has created a new and altered situation which bars res judicata as a defense. In what respect the act has changed the law is not stated. If it is thought that the Indian Claims Commission Act permits a trial *de novo* of adjudicated claims, we believe this language used in the case, Klamath v. United States, 296 U. S. 244, 80 L. ed. 202, is the answer: "It goes without saying that, if Congress intended to grant so sweeping and unique privilege, it would make the purpose unmistakenly plain." Cf. same case, 81 C. Cls. 79. We see nothing in the Indian Claims Commission Act that would permit a trial of the Assiniboine case *de novo*.

OFFSETS, FORMER ADJUDICATION OF

The contention is again made that the Court of Claims made no final determination of the offsets allowed in the former case. Our views were set forth in the former opinion and since we have not changed them it would be unnecessary repetition to restate them here. Allowed offsets in another case which exceed the amount of a former award do not present an insurmountable problem to the determination of which, or the part of which, may be available in other cases. See Kaw Tribe v. United States, Dockets 33 and 35, 2 Ind. Claims Com. 134.

EFFECT OF DECISIONS IN THE ALCEA ET AL. V. UNITED STATES

But aside from the jurisdictional problems presented by plaintiff, and which we have discussed above, we believe later decisions of the Court of Claims and the Supreme Court confirm the action of the Court of Claims in not allowing interest in the former case. In the case, Alcea Band v. United States, 103 C. Cls. 494, the Court of Claims decided that the appropriation of lands held by the Tillamook Indians under original Indian title, that is, Indian right of occupancy, based upon aboriginal possession, was compensable. This holding was approved by the Supreme Court (329 U. S. 40, 91 L. ed. 29). The land involved in that case was taken by an Executive order dated Nov. 9, 1855 (1 Kapp. 890-1) and the Supreme Court held on April 9, 1951, 341 U. S. 48, 95 L. ed. 738, that the recovery for the taking of the land was not grounded upon the Fifth Amendment and disallowed interest. It has been suggested that the ruling applies only to cases where Indian lands held by original Indian title are taken through executive or administrative action, and does not apply to such appropriations of land held by the Indians under title recognized by the Government. It seems obvious that whether the Indian title is "recognized" or "unrecognized" it is only the right of occupancy the Indians had, and in either case it is this right of occupancy that the Indians were deprived of by the official action. There would seem to be no logical reason for denying the Indians the protection of the Fifth Amendment for the taking of lands held under original Indian title by executive action and giving such protection where lands so taken are held under "recognized" title. As we understand the decision of the Supreme Court it is the manner of taking that determines whether the Fifth Amendment applies and not the tenure of occupancy, that is, not on whether the right of occupancy has been recognized by some governmental acknowledgment or whether the right of occupancy is based upon aboriginal possession.

Applying the above reasoning to the Assiniboine case, where the lands were appropriated by executive or administrative action and without Congressional authority, we

must conclude that the Fifth Amendment does not apply and the Court of Claims was correct in not allowing interest as a part of just compensation.

By reason of the foregoing the motion for summary judgment must be sustained and the amended petition dismissed.

/s/ Louis J. O'Marr,
Associate Commissioner.

I concur in the foregoing:

/s/ Wm. M. Holt,
Associate Commissioner.

Whit, *Chief Commissioner,* concurring:

I agree that defendant's motion for summary judgment based on the plea of *res judicata* is good and that the amended petition should be dismissed.

Regardless of whether the jurisdictional act upon which the decision of the Court of Claims (77 C. Cls. 347) was based authorizes the Court of Claims to award plaintiff "just compensation" or does not do so; or whether or not plaintiff's lands were taken in a manner entitling plaintiff to just compensation—the writer thinks the plea of *res judicata* should be sustained.

The plaintiff had a single cause of action, to-wit: one for damages sustained by reason of the loss of its lands. It elected to bring suit on that cause of action under the jurisdictional act upon which the decision pleaded as *res judicata* was a final determination of that lawsuit and of that cause of action.

The pending case is in effect a claim for interest which was not allowed it in the decision upon which the plea of *res judicata* is based. This claim for interest, however, is not a severable cause of action. The right to interest, if plaintiff ever was entitled to same, did not and does not of itself and by itself constitute a cause of action. If recoverable at any time it was merely an element of the damages to plaintiff by reason of the loss of the land—an element of a single cause of action. Therefore, the well recognized rule denying the right to split a cause of action,

which is briefly discussed in the main opinion, is thought by the writer to apply to the pending cause and to sustain defendant's plea of *res judicata*, and therefore to bar the right of plaintiff to maintain the pending action.

/s/ EDGAR E. WITT,
Chief Commissioner.

Dated this 12th day of December, 1952.

FINAL ORDER OF INDIAN CLAIMS COMMISSION.

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 62

THE ASSINIBOINE INDIAN TRIBE,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

FINAL ORDER

This cause came on to be heard before the Commission upon the motion for summary judgment filed herein by the defendant on the 10th day of January, 1952, which motion was directed to the amended petition of the plaintiff which was filed herein on the 18th day of July, 1951, and the parties to said cause having filed their briefs herein and orally argued the same before the Commission, and having submitted the motion to the Commission, the same was taken under advisement, and the Commission being now fully advised in the premises finds, for the reasons set forth in the opinion this day filed herein, that said motion of the defendant should be sustained and that the amended petition herein should be dismissed.

IT IS THEREFORE ORDERED AND ADJUDGED that said motion of the defendant is hereby sustained and that the amended petition of the plaintiff, filed herein on the 18th day of July, 1951 be, and the same is hereby dismissed.

Dated at Washington, D. C., this 12th day of December, 1952.

EDGAR E. WITT,
Chief Commissioner.

LOUIS J. O'MARR,
Associate Commissioner.

WM. M. HOLT,
Associate Commissioner.

JUDGE MADDEN'S DISSENTING OPINION IN THE BLACKFEET CASE (119 Fed. Supp. 161).

MADDEN, *Judge,* dissenting.

I think the court is in error in affirming the decision of the Indian Claims Commission dismissing the appellants' first claim on the ground of *res adjudicata.*

The purpose of the Indian Claims Commission Act was to close out the claims of Indian tribes for ancient wrongs, real or supposed, to which they had been subjected by the white man's Government. It was the intention of everyone concerned with the legislation that, instead of each tribe having to lobby for a special jurisdictional act waiving the statute of limitations and conferring jurisdiction upon this court to hear and decide that tribe's particular case, there should be a general waiver and a right in all tribes to be heard by a tribunal, the Indian Claims Commission, which could devote its full time to the consideration of the cases and get them decided, once and for all time, subject to appellate procedures in this court and the Supreme Court of the United States.

In the debates and discussions in the House of Representatives preceding the enactment of the Act the conclusion was reached that claims which had already had their day in court, on their merits, should not be reopened to the new procedure. That obviously reasonable conclusion was written into the House Bill by an amendment offered by Congressman Taber which read as follows:

> But no claim shall be considered by the commission where a final determination upon an issue of law or fact involved has been made on the merits of such issue by any court of the United States in a proceeding with respect to such claim. Cong. Rec. May 20, 1946, p. 5322.

Let us now suppose that the facts of the instant case had been presented to the House in the debate, and the question had been raised as to whether the Indian Claims Commission would have jurisdiction to entertain the claim. The appellant tribes owned a reservation given to them by a treaty in 1855. Some 12,000,000 acres of this reservation were taken from the tribe, without its consent and without compensation, by the Government in 1874. In 1924 Congress enacted a special jurisdictional act authorizing the plaintiffs to sue in this court on their claim for the land taken. A general statute provided that no interest should be allowed on a claim against the Government unless a statute or a contract provided for such interest. There was a settled judicial doctrine that jurisdictional acts authorizing suits against the Government are to be strictly construed. There was no case in which this court had ever awarded interest to an Indian Tribe in a suit against the Government for land taken. The tribes' lawyers did not even ask for interest in their suit. The court in 1935 determined the 1874 value of their land and gave them a judgment for that value, which judgment was paid in due course. The tribes had been deprived of their land more than 60 years before the judgment was rendered. Yet they received not a cent as compensation for their having had, for more than 60 years, neither the land nor its value in money. This court had not given, nor been asked to give, the slightest consideration to the question whether the tribes were entitled to be compensated for the deprivation. The reason obviously was that under the legal doctrines prevalent at the time, the able lawyers for the tribes concluded that it would have been futile to have asked for interest.

The question for the House would have been "Has a court made a final determination on the merits of the right

of the tribes to compensation for the 60 years delay in getting paid for their land?" The answer would have been that no court had even been asked to give the slightest consideration to the question, and of course had not determined it "on the merits" or otherwise. If someone had sought to introduce into the debate the legal doctrine of *res adjudicata,* that the tribes could have asked for interest, though knowing that they would not get it in this court; could have tried to obtain a review of the interest question in the Supreme Court, foreseeing that some years later that court would render a decision allowing such interest, it would have been obvious that that member of Congress had not caught the purpose and spirit of the Indian Claims Commission Act; that the discussion related to the substance of Indian claims, not to abstruse and technical legal doctrines.

In the Senate, at the recommendation of the Department of Justice, other language was substituted for the Taber amendment. It said:

> All claims hereunder may be heard and determined by the Commission, notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

The representative of the Department of Justice at the Senate Committee hearing stated categorically to the committee that no change was intended by the substitution, but only a clarification. Senate Hearings on H. R. 4497, 79th Cong. 2d Sess., July 13, 1946, pp. 58, 59.

The substituted language was adopted by the Senate, the Bill went to Conference; the Senate version was adopted by the Conference Committee; and the Bill was passed. The House Managers, in their report to the House, stated that the Senate amendment was not intended to preclude the adjudication by the Commission of any claim which had not been in fact previously adjudicated or settled on its merits. House Report No. 2693, 79th Congress, p. 6. On behalf of the House Managers, when the conference report was taken up in the House, it was said that they might file a supplemental statement later, they having been pressed

for time in making the deadline for their statement already filed. Cong. Rec. July 29, 1946, p. 10403. They did file a supplemental statement in which they said, among other things, that the substitution of the Senate amendment did not mean that causes of action which could have been brought under prior jurisdictional acts, but which were not brought, were barred. They referred, by way of illustration, to a case where a tribe had recovered the value of land taken but had not litigated the question of just compensation for delay in payment. They said that such a claim would not be barred by the Senate amendment. In filing the supplemental statement, it was said, for the House Managers, that numerous requests had been made by colleagues for an authoritative statement as to the effects of the Senate amendment and as to other parts of the Conference report, and that, in confirmation of informal explanations already made to their colleagues, they had prepared the supplemental statement. Cong. Rec. August 12, 1946, A 4923.

In the circumstances, it seems to me quite conclusive that those who had charge of the legislation on the House side supposed that they had obtained a statute which barred only claims which had in fact been litigated and decided, and not those which might, in ordinary litigation, be barred on the technical ground that they might have been litigated and decided in a prior action. And not only those who had charge of the legislation, but other members who had inquired of them, had been led to approve the Conference report by their assurance as to what the Senate amendment meant. In the Senate the Committee had been assured by the Department of Justice that the Senate Amendment did not change at all the meaning of the House version which had said expressly that only claims previously determined on their merits would be barred. So far as appears, the Senate passed the bill relying on that assurance.

The interpretation for which the Government now contends seems to contradict the intention of every person in the Congress who had anything to do with the legislation. It contradicts the purpose of the Indian Claims Commis-

sion Act, to get the claims of the Indians decided so that it can be said to them, "You have had your day in Court. Your case has been heard and deliberated upon by a responsible tribunal and it will not be heard again." Under the court's decision of today, the only answer which can be given to these appellants will be *"Res adjudicata."* I should suppose that the more this cryptic expression is explained to them, the less clear they will be as to what has happened to their constitutional rights.

The doctrine of *res adjudicata* is a doctrine of repose. But the Indian Claims Commission Act is a statute of repose. As interpreted today it will not bring repose. The right to petition for a redress of grievances is not subject to the doctrine of *res adjudicata.*

PERTINENT PORTIONS OF OPINION OF COURT OF CLAIMS IN FORMER ASSINIBOINE CASE (77 C. Cls. 362).

"Plaintiff in this case, an Indian tribe, asks judgment against the defendant for $62,000,000 as damages 'for violation of the rights of the plaintiff.' The petition shows that damages are sought to be recovered by reason of the defendant having appropriated certain lands to which it is alleged plaintiff had title, and a further claim is made on account of destruction of game alleged to have been wrongfully permitted by defendant on this land. Jurisdiction is conferred by two jurisdictional acts of Congress which authorize the court to award the plaintiff any damages which it may have sustained by wrongful appropriation of its land and also to set off against such damage any sum or sums paid or expended for the benefit of the Indians. These acts are too long to be set out in the opinion. They can be found in the plaintiff's petition and in the findings of fact. As counsel for the respective parties do not agree as to the force and effect of these acts, it will be necessary to determine the construction thereof before applying them.

"The plaintiff claims to have held title by 'immemorial possession' to a large tract of land lying north of the Missouri River and between it and Canada, which will be more

particularly described hereinafter. It further claims title to a large tract south of the Missouri River which was ceded to it by the Treaty of Fort Laramie made in 1851 and also claims to have had title to this land by 'immemorial possession.'"

* * *

"Under the jurisdictional acts hereinabove set out the plaintiff has filed its petition alleging among other things that by various acts of the Government the defendant has appropriated certain lands to which it had title. For convenience in considering the questions thereby raised and for the purpose of orderly discussion thereof, the territory claimed may be divided into two tracts:

"First. That granted by the Treaty of Fort Laramie. The material parts of this treaty are set out in finding II. This grant is not denied and in a general way it may be said to include a tract bounded on the north and northwest by the Missouri River as far east as its junction with the Yellowstone, and on the east and southeast by the Yellowstone River, on the southwest by a line drawn from a point where the Powder River enters the Yellowstone in a northwesterly direction to a point where the Musselshell River enters the Missouri. It is somewhat in the shape of a triangle and contains about 6,477,940 acres. It is about half the size of the tract which plaintiff claims to have owned north of the Missouri to which reference will next be made.

"Second. A tract north of the Missouri River which in a general way may be said to have extended between Canada on the north and the Missouri River on the south, also from the Rocky Mountains on the west, eastward a comparatively short distance into Dakota.

"Plaintiff claims title by 'immemorial possession' to all of the land contained in both of these tracts and also claims the benefit of the provisions of the Fort Laramie Treaty.

"The plaintiff further alleges that by the treaty of October 17, 1855, made with the Piegan, Blackfeet, Blood, Gros Ventre, and other tribes, a large tract of land was taken from it to which it had title by 'immemorial possession' and under the Treaty of Fort Laramie and the

same granted to the Blackfoot Nation as a reservation for its exclusive use and occupancy."

• • •

"Other appropriations by defendant of the lands to which plaintiff claimed to have title by 'immemorial possession', or under the Treaty of Fort Laramie, or by both, are alleged in the petition, but it is not necessary to set them out in detail here for the reason that there is no question but that the Government did at sometime appropriate all of the lands in controversy.

• • •

"The plaintiff's case with reference to what is called the Fort Laramie lands is quite different. The lands were expressly granted to the plaintiff tribe by the treaty made with the plaintiff on September 17, 1851, and one of its purposes was to give each tribe some fixed boundaries within which they should stipulate generally to reside. It was also desired to give the Indians some compensation for the interference with the Indian hunting expeditions caused by emigrants passing to the Pacific coast region.

"There is no question but what the lands granted the plaintiff tribe by the Treaty of Fort Laramie were taken over by the Government, but the time when they were taken has some bearing on the amount of damage which the plaintiff may have sustained thereby.

"When the Fort Buford Military Reservation was established by the Executive order of August 18, 1868, a part of the Fort Laramie lands in the northeast corner thereof was taken thereby. Of the area set apart to this military reservation, about 163,125 acres lay south of the Missouri River and within the lands ceded to the Assiniboine Nation by the Fort Laramie Treaty. On April 13, 1875, an Executive order was entered by which the greater portion of the tract ceded to plaintiff by the Fort Laramie Treaty was, in the terms of the order, 'withdrawn from sale, and set apart as an addition to the present reservation of the Gros Ventre, Piegan, Blood, Blackfeet, and Crow Indians', and of the land included in this order about 5,865,990 acres lay within the boundaries of the land heretofore ceded by the

Fort Laramie Treaty to the Assiniboines. The land that was taken for the Fort Buford Reservation and by the Executive order of April 13, 1875, included (with more) all of the land granted to the plaintiff by the Fort Laramie Treaty except a comparatively small portion south of the forty-seventh parallel. In July 1880, by an Executive order a part of the area affected by the Executive order of April 13, 1875, was restored to the public domain, and later and about 1882, the defendant surveyed and filed plats of the portion of the Fort Laramie land south of the forty-seventh parallel and thereafter either opened the land to settlement or donated it to the Northern Pacific Railroad. In this way the Government disposed of all of the land granted to plaintiff by the Fort Laramie Treaty."

* * *

"There is much dispute as to the value of the land ceded by the Treaty of Fort Laramie and which, as we have seen, was taken over by the defendant by the proceedings recited above. The plaintiff produced as its chief witnesses persons whom it considers experts of high skill in the matter of land values in this region, but we are not inclined to accept their testimony, although it was doubtless given in good faith. The testimony of these witnesses does not appear to have taken into consideration the proper basis upon which an estimate of the value of these lands must be founded. The tract under consideration consisted of over 6,000,000 acres. Government values and sales of comparatively small, and in some instances select tracts, have but little weight in determining the value of such an enormous body of land when disposed of as a whole. The reasons for this are shown in the opinion in the case of the *Fort Berthold Indians* v. *United States,* 71 C. Cls. 308, 339-340, and, as said in the opinion rendered in that case, the land in question had but little value until the railroad was built somewhere near it, and the best measure of value is that paid by 'the Government for lands acquired about the same period of time from other Indian tribes in the same locality in cessions to the Government of their reservations in many treaties.' As an example of the prices so paid, we call attention to the fact that in January 1887 an agree-

ment was made with several tribes, including the Assiniboines, relinquishing their rights to certain lands heretofore granted them aggregating about 17,500,000 acres at a price which would average about 25 cents an acre. It is true that some tracts were ceded for a higher price and it is also true that some were ceded for a much lower price. The geographies and encyclopedias show that the land in controversy was in a semiarid region and that only a very small part was suitable for agriculture unless irrigated; that only a comparatively small part could be irrigated; and that a certain part of the land was absolutely worthless and the greater part of it was fit only for grazing purposes and required a large number of acres to support a single animal. At the time in question there was a superabundance of western grazing land. We conclude that the value of this land at the time it was taken did not exceed 50 cents an acre and may have been less, and that its total value did not excede $3,238,970."

* * *

"The amount which the defendant is entitled to offset against any claims which are allowed in favor of the plaintiff is also in dispute. Counsel for defendant contend that the Government is entitled to set off all sums of money expended for the benefit of the Indians, including gratuities, and that this includes the money which the plaintiff tribe has received for surplus lands sold in the two reservations which it has occupied, and also the money paid plaintiff under the treaty of 1888. But the plaintiff insists that the defendant is not entitled to any set-off on account of the land allotted to plaintiff in the two reservations or the money which plaintiff has received for the surplus lands sold, and that the money paid plaintiff under the treaty of 1888 cannot be set off against anything allowed on the plaintiff's claim for lands between the Yellowstone and Missouri Rivers—that is, the Fort Laramie lands. The question so raised involves the construction of the language of the two acts. We have set out in the findings the language of the jurisdictional acts, the first of which defined the credits which might be allowed the defendant. As applied to the facts in the case, we find nothing in the

first act that in any way limits the credits to be allowed the defendant for any sum or sums paid or expended for the benefit of the plaintiff tribe. The act recites that 'the United States shall be allowed credit subsequent to the date of any Executive order, law, treaty, or agreement under which the claims arise for any sum or sums heretofore paid or expended for the benefit of said Indians.' The original act authorized the court to adjudicate claims arising out of the Treaty of Fort Laramie and the treaty of 1855 and 'any subsequent act of Congress, treaty, agreement, or Executive order' and provided that the Government should have credit for any sums paid for the benefit of the Indians subsequent to the date thereof. We think that the only controversy which can arise under this provision is as to whether this provision in the first act would apply to lands which were allotted to plaintiff and we do not find it necessary to decide this question for reasons hereinafter stated.

"Plaintiff contends that under the provisions of the second jurisdictional act defendant cannot be allowed any set-off on account of moneys paid under the act of 1888 unless it is awarded damages under the provisions of the second jurisdictional act, that is, on account of the appropriation of lands to which plaintiff claims title by 'immemorial possession.' We have already held that plaintiff did not acquire title to any land in that manner, and under this holding a question arises as to whether the defendant can be allowed a set-off on account of money so paid against any claim which the plaintiff may have on account of the appropriation by the defendant of the lands ceded by the Fort Laramie treaty.

"In order to properly consider the question thus raised it will be necessary to set out and restate to some extent the manner in which the reservation for the Blackfeet, Gros Ventre, and Crow Indians was established. As before stated, the treaties of 1868 were not with the plaintiff tribe but with the Blackfoot Nation and the Gros Ventre Tribe of Indians. Each of these treaties provided that the Government might have the right to place upon the reservation which was created thereby other Indian tribes. The Assiniboines eventually came upon this reservation

and established themselves there without any formal order. Subsequently the reservation was enlarged by an Executive order and act of Congress. In the meantime the Assiniboines continued to dwell upon this reservation. In 1886 and 1887 an agreement was concluded with all of the Indians residing upon the Gros Ventre, Piegan, Blackfoot, and River Crow Reservation in Montana (to which the Assiniboines were a party) by which all the Indian tribes which were a party thereto ceded to the United States all their right, title, and interest in the lands embraced in this reservation excepting such as was specially set apart and reserved as separate reservations for any Indian tribes. This treaty provided for certain payments to be made to the Indians who were upon the reservation, and in 1888 Congress passed an act for the fulfillment of the treaty and under which these payments were made. The second jurisdictional act contained a provision as follows:

> "*Provided, however,* That if the courts shall award damages for land appropriated by the said treaty of 1855, and/or the said act of Congress of 1874, the United States shall be allowed credit for any sum or sums paid the Assiniboine Indian Nation under the act of Congress of May 1, 1888."

"We do not think it can be said that this provision operated to repeal the broad provisions of the first jurisdictional act to the effect that the Government should be allowed credit for any sum or sums heretofore paid or expended for the benefit of said Indians, including gratuities, or that it was inconsistent therewith. Nor do we understand that counsel for plaintiff claim that it placed any limitation on the application of payments made under the act of 1888, but only that it operated to prevent such payments from acting as an estoppel as against plaintiff's claim that it had title to the land on this reservation by 'immemorial possession.' As we understand plaintiff's contention, it is that by reason of the fact that (as it claims) the plaintiff held title to these lands through 'immemorial possession' and had also had portions thereof assigned or allotted to it, the defendant received a full

consideration for all payments made under the treaty of 1888 by reason of the plaintiff having joined in ceding the land covered thereby and is not entitled to any further credit therefor. Such a construction would entirely nullify the provision of the first act with reference to credits. Moreover, we think the obvious intention of the first act and the second act taken together was to effect a settlement between the Government and the plaintiff in which each party would receive all credits to which it was respectively entitled. We therefore conclude that the defendant is entitled to offset all payments made for the benefit of the plaintiff tribe under the act of 1888 against any sum which might be charged against the Government on account of the appropriation of the lands ceded to plaintiff by the Fort Laramie Treaty.

"The Comptroller General's office has made a careful computation of the sum for which it considers the plaintiff tribe should be charged, which counsel for defendant contend is $5,137,668.71. See finding XII. Under the foregoing rulings we think this computation is correct, except as to the items of miscellaneous revenue, Treasury balances, interest, and 'Crows' fund' aggregating $221,563.01. It also includes a number of items where the money was expended only indirectly for the benefit of the Indians, or jointly for their benefit and purposes of the Government. These items amount to $688,631.14, all of which is more fully set out in finding XII. Assuming for the purposes of the case that none of these items should be credited against the plaintiff tribe, we have a total of $910,194.15 which should be deducted from the amount estimated by the Comptroller General's office, leaving a net credit to the Government of $4,227,474.56, while we have found that the value of the land belonging to the plaintiff tribe which was appropriated by the Government did not exceed $3,238,970.

"There still remains the question of whether the Government should be allowed any credit on account of the land allotted to the plaintiff tribe on the Fort Peck and the Fort Belknap Reservations. We do not find it necessary to determine this question as the amount of payments which we have already found the Government is entitled to offset ex-

ceeds the value of the land of the plaintiff tribe acquired under the Fort Laramie Treaty and plaintiff's petition should therefore be dismissed. It is so ordered."

Judgment entered by the Court.

"At a (session of the?) Court of Claims held in the City of Washington on the 4th day of December, A. D., 1933, judgment was ordered to be entered as follows:

" 'Upon the special findings of fact, which are made part of the judgment herein, the Court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.' "

SECTIONS 1 AND 4 OF THE ACT UNDER WHICH THE FORMER CASE WAS HEARD, AS THEY WERE REPORTED BY THE SENATE COMMITTEE ON INDIAN AFFAIRS AND PASSED THE SENATE.

69th Congress
1st Session

CALENDAR No. 350

S. 2141

(Report No. 351)

In the Senate of the United States

January 5, 1926

Mr. Wheeler introduced the following bill; which was read twice and referred to the Committee on Indian Affairs

March 11, 1926

Reported by Mr. Wheeler, with amendments
(Omit the part struck through and insert the part printed in italic)

A BILL

Conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Assiniboine Indians may have against the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all claims of whatsoever nature which the

Assiniboine Indian Nation or tribe may have against the United States, which have not heretofore been determined by a court of competent jurisdiction may be submitted to the Court of Claims for determination of the amount, if any, due said Indians from the United States under any treaty or agreement or law of Congress, or for the misappropriation of any of the property or funds of said Indians, or for the failure of the United States to administer the same in conformity with any treaty or agreement with the said Indians: *Provided,* That if in any claim submitted hereunder a treaty or an agreement with the Indians be involved, and it be shown that the same has been amended or superseded by an Act or Acts of Congress, the court shall have authority to determine whether such Act or Acts have violated any property right of the claimants, and, if so, to render judgment for the damages resulting therefrom; and jurisdiction is hereby conferred upon said Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, to hear and determine all legal and equitable claims of whatsoever nature which said Indians may have against *the United States, it being the intent of this Act to confer upon the* said Court of Claims full and complete authority to adjust and determine all claims submitted hereunder so that the rights, legal and equitable, both of the United States and of said Indians may be fully considered and determined and to render judgment thereon accordingly.

* * *

SEC. 4. That if it be determined by the court that the United States, in violation of the terms and provisions of any *Executive order,* law, treaty, or agreement, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all

damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Assiniboine Indians in and to such money or other property.

SECTIONS 1 AND 4 OF THE ACT AS REPORTED BY THE HOUSE COMMITTEE ON INDIAN AFFAIRS SHOWING THE AMENDMENTS MADE BY THE HOUSE COMMITTEE.

UNION CALENDAR No. 318

69th Congress
1st Session

S. 2141
(Report No. 952)

IN THE HOUSE OF REPRESENTATIVES
April 6, 1926

Referred to the Committee on Indian Affairs
April 22, 1926

Reported with amendments, committed to the Committee of the Whole House on the state of the Union, and ordered to be printed
(Omit the part struck through and insert the part printed in italic)

AN ACT

Conferring jurisdiction upon the Court of Claims to hear, examine, adjudicate, and enter judgment in any claims which the Assiniboine Indians may have against the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, ~~That all claims of whatsoever nature which the Assiniboine Indian Nation or tribe may have against the United States, which have not heretofore been determined by a court of competent jurisdiction, may be submitted to the Court of Claims for determination of the amount, if any, due said Indians from the United States under any~~

~~treaty or agreement or law of Congress, or for the misappropriation of any of the property or funds of said Indians, or for the failure of the United States to administer the same in conformity with any treaty or agreement with the said Indians: *Provided*, That if in any claim submitted hereunder a treaty or an agreement with the Indians be involved, and it be shown that the same has been amended or superseded by an Act or Acts of Congress, the court shall have authority to determine whether such Act or Acts have violated any property right of the claimants, and, if so, to render judgment for the damages resulting therefrom; and jurisdiction is hereby conferred upon said Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, to hear and determine all legal and equitable claims of whatsoever nature which said Indians may have against the United States, it being the intent of this Act to confer upon the said Court of Claims full and complete authority to adjust and determine all claims submitted hereunder so that the rights, legal and equitable, both of the United States and of said Indians may be fully considered and determined and to render judgment thereon accordingly.~~ *That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate, and render judgment in any and all claims arising under or growing out of the Treaty of Fort Laramie of September 17, 1851 (Eleventh Statutes, page 749), between the Government of the United States and the Assiniboine Indian Nation, and other Indian nations therein specified; and the treaty of October 17, 1855 (Eleventh Statutes, page 657), between the Government of the United States and the Blackfeet Indian Nation and other Indian nations therein specified; or any subsequent Act of Congress, or any treaty, Executive order, or treaty with any other Indian tribe or nation that violates any of the treaty rights of the Assiniboine Indian Nation which the said Assiniboine Nation or Tribe may have against the United States, which claims have not heretofore been determined*

and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States; and jurisdiction is hereby conferred upon the said courts to determine whether or not any provision in any such treaty has been violated or breached by any Act or Acts of Congress, or by any treaty made with any other Indian tribe or nation, and, if so, to render judgment for the damages resulting therefrom.

* * *

SEC. 4. That if it be determined by the court that the United States, in violation of the terms and provisions of any Executive order, law, treaty, or agreement, *set forth and referred to in section 1* has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Assiniboine Indians in and to such money or other property.

Office - Supreme Court, U.
FILED
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HAROLD B. WILLEY, Clerk

No. 323

BEFORE THE

INDIAN CLAIMS COMMISSION

Docket No. 62

THE ASSINIBOINE INDIAN TRIBE,
Plaintiff,

vs.

THE UNITED STATES,
Defendant.

AMENDED PETITION OF PLAINTIFF

LOUIS A. GRAVELLE,
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Of Counsel,
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BEFORE THE

INDIAN CLAIMS COMMISSION

Docket No. 62

THE ASSINIBOINE INDIAN TRIBE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

AMENDED PETITION

To the Honorable Commissioners of the Indian Claims Commission:

The Plaintiff in the above entitled cause, the Assiniboine Indian Tribe, with leave first had and obtained from the Commission files this, its Amended Petition, in the above entitled proceeding and respectfully states to the Commission as follows:

I

The Plaintiff files this suit against the Defendant, the United States, under the authority of the Act of Congress, approved August 13, 1946 (60 Stat. 1049) entitled "An Act To Create an Indian Claims Commission to Provide for the

Powers, Duties and Functions Thereof and for other Purposes."

II

The Plaintiff is an Indian tribe, living on two United States Indian reservations in Montana known as Ft. Belknap and Ft. Peck reservations, under guardianship of the United States. They have existed and are now existing as a recognized tribe. The Assiniboine Indian Tribe has entered into contracts, to-wit a contract between the Assiniboine Indians of the Fort Belknap Reservation, Montana and Louis A. Gravelle, Douglas Whitlock and Edward F. Howrey, and a contract between the Assiniboine Indians of the Fort Peck Reservation, Montana and Davies, Richberg, Beebe, Busick and Richardson which contracts have been approved by the Commissioner of Indian Affairs as required by statute, whereby said attorneys are duly authorized to represent the said Assiniboine Indian Tribe, and to file and prosecute its claims against the United States before this Honorable Commission.

III

By treaty between the United States of America and the French Republic, ceding territory of which the lands hereinafter described are a part, the Defendant herein entered into a solemn and binding obligation contained in Articles 3 and 6 of said treaty signed April 30, 1803, in the following words:

"ART. III

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.

"ART. VI

"The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other suitable articles shall have been agreed upon."

Copy of said treaty is attached hereto, made a part hereof and marked Appendix A.

IV

Between the years 1803 and 1853 the Plaintiff together with various other tribes of Indians occupied, held and used the territory south of the present Canadian border, west of the Mississippi and Missouri Rivers, north of the lines of Texas and New Mexico, and east of the Rocky Mountains.

The boundaries of the territory claimed and occupied by the Plaintiff were in part as follows:

> Commencing at the mouth of the Yellowstone River, thence up the Missouri River to the mouth of the Musselshell River; thence from the mouth of the Musselshell River, following a direct line in a Southeasterly direction to the mouth of the Powder River; thence down the Yellowstone River to the point of beginning.

In order to overcome and obviate trouble due to strife and warfare among the Indian Tribes which at times resulted in injury to the white people, and to remove dissatisfaction among the Indians respecting the killing of their game, and the taking of timber and grass by white persons passing through their country to the far west, for which trespasses the Indian tribes were demanding payment, a commission was specially appointed by the President of the United States in the year 1851 to meet said Indian tribes in council for the purpose of making a treaty of peace and friendship. The Commissioners appointed on the part of the United

States, D. D. Mitchell, Superintendent of Indian Affairs, and Thomas Fitzpatrick, Indian Agent, accompanied by army officers and interpreters, met with the Plaintiff tribe and certain other tribes, to-wit: the Sioux, the Cheyennes, the Arapahoes, the Crows, the Gros Ventre, the Mandans and the Arickarees, in general council at Fort Laramie in the present State of Wyoming.

V

On September 17, 1851, the Plaintiff with other Indian tribes entered into and signed a treaty, after long deliberation and conference with authorized representatives of the United States, known as the treaty of Fort Laramie (11 Stat. 749; 2 Kappler, 594). The said treaty was signed by Chiefs of all the Indian tribes there assembled, and by the Commissioners on the part of the United States. The said treaty was transmitted to the Senate of the United States by the President for approval. The Senate on May 24, 1852 (Senate Journal, Volume 8, 1848-1852, pages 389 to 390), confirmed the same with an amendment reducing the annual payments of $50,000.00 in provisions, etc., for a period of fifty years as provided in said treaty, to $50,000.00 a year for a period of ten years, and five years additional at the discretion of the President. The said treaty as modified was returned to the tribes concerned and the assent of all was secured. The Assiniboine Tribe assented to the amendment in September, 1852. The said treaty became and was thereafter fully effective. Congress made appropriations to carry its terms into effect.

The treaty of Fort Laramie, dated September 17, 1851 (11 Stat. 749), is attached hereto, made a part hereof and marked Appendix B.

VI

Plaintiff was the owner by original Indian title of certain lands described in said treaty. That said treaty was a

recognition of Plaintiff's right and title to the exclusive use and occupancy of a definitely defined tract of country in the present State of Montana. Said tract was bounded as follows:

> Commencing at the mouth of the Yellowstone River, thence up the Missouri River to the mouth of the Musselshell River; thence from the mouth of the Musselshell River, following a direct line in a southeasterly direction to the mouth of the Powder River; thence down the Yellowstone River to the place of beginning, containing approximately 6,477,940 acres.

The Plaintiff continued the full occupancy and use of said lands exclusively and uninterruptedly thereafter from 1851 until the defendant, without Plaintiff's consent, took all of said lands for public use at different times without payment of just compensation as hereinafter set out.

VII

Plaintiff has not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States but ever and always, since it entered into the said treaty of Fort Laramie, has in good faith kept and performed each and every of the covenants of the said treaty agreed by it to be observed and performed; and has not only observed the terms of this treaty, but has actively aided and assisted the United States in its prosecution of campaigns against other hostile Indian tribes, supplying the United States Army with numerous scouts and soldiers.

VIII

On July 2, 1864, the Congress of the United States chartered the Northern Pacific Railroad and in said Act provided:

> "Section 3. And be it further enacted, that there be, and hereby is, granted to the Northern Pacific Rail-

road Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, each alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, * * *."

"Section 2. * * * The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this Act, and acquired in the donation to the (Road) named in this Bill." (13 Stat. 365)

When the Northern Pacific Railroad was constructed pursuant to the authority of the above Act, its line paralleled the eastern boundary of Plaintiff's Fort Laramie treaty lands, as defined and bounded in the treaty, for a considerable distance. As a result of the Statute and the construction of the railroad, the United States took approximately 2,267,504 acres of Plaintiff's Fort Laramie Treaty lands for public use without compensation or consideration of any kind, and conferred title to such acreage on the Northern Pacific Railroad Co. This was done without the consent of Plaintiff. The average value per acre of Plaintiff's land so taken for public use at the time of such taking was $1.85 per acre and the total value of the land so taken was approximately $4,194,882.40. Plaintiff has, therefore, suffered loss and damage in the sum of $4,194,882.40, which sum, plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking measured by a reasonable rate of interest from the time of taking to the date of payment, is the just compensation to which the Plaintiff claims it is entitled under the Fifth

Amendment to the Federal Constitution for such loss and damage so suffered by Plaintiff.

IX

The United States, without the consent of the Plaintiff, through an Executive Order, made and promulgated by the President of the United States on August 18, 1868, directed that a part of the said territory definitely defined and bounded by the said Treaty of Fort Laramie as hereinabove set out in paragraph VI, be set apart as a military reservation for the use and benefit of the United States. The said Executive Order of August 18, 1868 defined and bounded the said military reservation as follows:

> "The initial point is at the intersection of the 104th degree of longitude west from Greenwich with the 48th parallel of north latitude; thence run south fifteen (15) miles, thence east fifteen (15) miles, thence north thirty (30) miles, thence west thirty (30) miles, thence south thirty (30) miles, thence east fifteen (15) miles; * * *"

A copy of the said Executive Order is hereto appended and marked Appendix C.

The land so defined and set apart as the military reservation known as Fort Buford continued to be used as a military reservation for some years. The land so taken, without Plaintiff's consent, on which to establish the military post of Fort Buford included approximately one hundred and sixty-nine thousand, five hundred and seventy-four (169,574) acres of Plaintiff's Fort Laramie treaty lands.

After Fort Buford was abandoned as a military reservation, the Congress of the United States passed an Act, approved May 19, 1900, (31 Stat. 180) directing that the lands within the said reservation which were not otherwise occu-

pied or used for any public purpose were made subject to disposal under the Homestead, Town-site and Desert Land Laws. In the Appropriation Act of 1900, the following appears.

> "For the survey of lands in the Fort Buford abandoned military reservation in the States of North Dakota and Montana to be made in the manner as other surveys of public lands are made, $11,000.00." (31 Stat. 617)

By the said Act, approved May 19, 1900, the United States took 169,574 acres of Plaintiff's lands for public use without compensation or consideration of any kind, sold them or opened them up for public settlement under the land laws and covered the proceeds thereof into the Treasury of the United States. The land so taken at the time of said taking had an average value of $1.74 per acre or a total value of $295,058.76. Plaintiff, therefore, has suffered loss and damage in the sum of $295,058.76, which sum, plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking measured by a reasonable rate of interest from the time of taking to the date of payment, is the just compensation to which the Plaintiff claims it is entitled under the Fifth Amendment to the Federal Constitution for such loss and damages so suffered by Plaintiff by reason of the taking by the United States of these lands.

X

The United States took for public use without compensation or consideration of any kind the remainder of Plaintiff's Fort Laramie Treaty lands, which amounted to 4,040,862 acres. The President of the United States, without the consent of the Plaintiff, made and promulgated an Executive Order dated April 13, 1875, by which he "withdrew from sale" and set apart as an addition to the then

reservation of the Gros Ventre, Piegan, Blood, Blackfeet, and Crow Indians, certain of Plaintiff's Fort Laramie Reservation lands as follows:

> "Commencing at a point where a straight line drawn from the mouth of the Musselshell River to the mouth of the Powder River intersects the 47 degree parallel of north latitude; thence east with the said parallel to the south bank of the Yellowstone River, thence down and with the south bank of said River to the south boundary of the military reservation at Fort Buford; thence west along the south boundary of said military reservation to its western boundary; thence north along said western boundary to the south bank of the Missouri River; thence up and with the south bank of said river to the mouth of the Musselshell River; thence along the straight line drawn between the mouth of the Musselshell River to the mouth of the Powder River to the place of beginning."

A copy of the Executive Order of the President of April 13, 1875 is attached hereto and made a part hereof and marked Appendix D. Further, the President of the United States issued an Executive Order, dated July 13, 1880, "restoring to the public domain" a portion of Plaintiff's land definitely defined and bounded in the said Treaty of Fort Laramie. Plaintiff's lands included in said Executive Order were bounded as follows:

> "Beginning at a point where the south boundary of the Fort Buford military reserve intersects the right bank of the Yellowstone River; thence according to the true meridian west along the south boundary of said military reserve to its western boundary; thence continuing west to the right bank of the Missouri River; thence up and along said right bank, with the meanders thereof, to the middle of the main channel of the Musselshell River; thence to a point where a straight line drawn from the middle of the main channel of the Musselshell River to the mouth of the Pow-

der River intersects the 47 degree parallel of north latitude; thence east with the said parallel to the south bank of the Yellowstone River, thence down and with the south bank of said River to the south boundary of the military reservation, the place of beginning."

A copy of the Executive Order of the President dated July 13, 1880 is attached hereto, made a part hereof and marked Appendix E. Thereafter, the lands covered by the Executive Orders of April 13, 1875 and July 13, 1880 were thrown open for public entry and settlement or sold as public lands, and the proceeds of the sales covered into the United States treasury.

The land of Plaintiff included in the Executive Orders of April 13, 1875, and July 13, 1880 was taken for public use without compensation or consideration of any kind and disposed of under the General Land Laws of the United States, together with that part of Plaintiff's land lying between the south boundary of the land embraced in the Executive Order of the President of July 13, 1880, and the Yellowstone River, also taken without compensation, amounted to approximately 4,040,862 acres. The average value of these lands per acre at the time of taking was $1.85 per acre for 3,574,992 acres and $1.24 for 465,870 acres and the total value of such lands so taken was $7,191,414.00. Plaintiff, therefore, has suffered loss and damage by the taking of said lands for public use in the sum of $7,191,414.00, which sum plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking measured by a reasonable rate of interest from the time of taking to the date of payment, is the just compensation under the Fifth Amendment to the Federal Constitution, to which Plaintiff claims it is entitled by reason of such loss and damage so suffered by Plaintiff.

At the time the Executive Order of July 13, 1880, was issued there were in existence and applicable to the Terri-

tory of Montana the Homestead, Town-site, Desert Land and other Federal statutes under which public lands could be acquired by citizens. The machinery for acquiring lands under the various statutes had been set up in the Territory of Montana. An Act of Congress of March 2, 1867 (14 Stat. 542) authorized the President to appoint a surveyor-general for Montana. The President was also authorized to appoint by and with the advice and consent of the Senate. a Register and Receiver of public moneys for the district. An earlier act (June 12, 1840) (5 Stat. 384) provided that once a surveyor-general was appointed for a district the survey of the land must be completed at the earliest possible date.

When the Department of the Interior was created, the administration of these laws was transferred to that department. When surveys were completed and plats filed public lands could be acquired under the General Land Laws without any special act applying to specific lands. When plaintiff's lands were "restored to the public domain" by the Executive Order of July 13, 1880, they were surveyed, plats filed, and were disposed of as public lands of the United States.

Plaintiff is informed and believes that its Fort Laramie treaty lands, other than those granted to the Northern Pacific Railroad Company were disposed of by the United States under the erroneous impression or belief, entertained at that time, that such lands were in fact public lands of the United States.

The Congress was advised from time to time that petitioner's Fort Laramie treaty lands were being disposed of by the government and the proceeds being covered into the Treasury of the United States. Congress from time to time made substantial appropriations for the benefit of the Assiniboine tribe. It approved an agreement with them in 1888 establishing the present reservations at Fort Peck

and Fort Belknap for the Assiniboine, Sioux and Gros Ventre tribes.

In 1925 a joint committee of the two Houses of Congress investigated the Northern Pacific land grants. During the hearings the committee asked the Interior Department to advise them of the number of acres of land within the territory of the various tribes, parties to the Treaty of Fort Laramie included in the grant to the Northern Pacific Railroad Company. In response to this request the Committee was supplied with tables showing the acreage and with maps showing the locations of the lands of the various tribes, including the Assiniboine, title to which was granted to the said Railroad Company. This committee and the Congress were, therefore, fully advised at that time that certain of the plaintiff's Fort Laramie treaty lands were granted to the Northern Pacific Railroad Company. (Hearings before the Sub-committee of the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants, Vol. V., pp. 1940-1943.)

The Executive Orders of April 13, 1875 and July 13, 1880 were known to the Congress of the United States.

With knowledge of the taking and disposition of plaintiff's lands Congress did not take any steps to restore the lands to their rightful occupants or to compensate plaintiffs for such lands.

The United States, therefore, ratified and confirmed the action of the Government in appropriating and disposing of the Plaintiff's Fort Laramie treaty lands with the exception of the tribal lands set forth in paragraphs VIII and IX which were taken by direct acts of the Congress.

XI

Plaintiff brought an action against the Defendant for damages for illegal and unlawful takings on January 30,

1928 in the United States Court of Claims under the authority of an Act of Congress approved March 2, 1927 (44 Stat. 1263) which in part provided:

> "Sec. 4. That if it be determined by the court that the United States in violation of the terms and provisions of any Executive Order, law, treaty, or agreement, set forth and referred to in section 1, has *unlawfully appropriated* or disposed of any money or other property belonging to the Indians, *damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal,* * * *." (Italics supplied.)

On the 10th day of April, 1933, the Court of Claims dismissed Plaintiff's cause of action, 77 C. Cls. 347. Petition for writ of certiorari was denied by the Supreme Court of the United States (292 U. S. 606, 607, 78 L. ed. 1467).

On examination of the evidence including setoffs, the Court being limited to the value of the land at the time of such appropriation, found that the amount of the damages were exceeded by the setoffs. In its opinion dismissing the aforementioned petition the Court of Claims held that the treaty lands involved in said petition belonged to the Plaintiff as the result of the treaty of September 17, 1851 and that said lands were taken from the Plaintiff by the Defendant for public use without any compensation having been paid to the Plaintiff as the result of the taking. The Jurisdictional Act under which Plaintiff brought the above action in the Court of Claims provided for recovery of the value of the property at the time of the taking and did not provide for the granting of "just compensation".

Other than as stated above Plaintiff has not heretofore submitted any claim against the United States in this Commission, nor in the Court of Claims, nor in the Supreme Court of the United States, based upon the subject matter of this suit.

Plaintiff is now entitled under the Indians Claims Commission Act to just compensation under the Fifth Amendment to the Constitution which includes the value of said lands when taken plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking, less legal offsets.

XII

Wherefore and by reason of the premises aforesaid Plaintiff sues the United States and prays that this Honorable Commission will render judgment for damages in the amount of Eleven Million, Six Hundred Eighty-one Thousand, Three Hundred Fifty-five and 16/100 Dollars ($11,-681,355.16) representing the value of six million four hundred seventy-seven thousand nine hundred forty (6,477,-940) acres so taken by Defendant plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking measured by a reasonable rate of interest from the time of taking to the date of payment, less legal offsets as provided by Section 2 of the Indian Claims Commission Act of August 13, 1946. (60 Stat. 1049).

(sgd.) Louis A. Gravelle,
(sgd.) Douglas Whitlock,
(sgd.) Edward F. Howrey,
1032 Shoreham Building,
Washington 5, D. C.
(sgd.) Davies, Richberg, Beebe, Busick & Richardson,
Wire Building,
Washington 5, D. C.,
Attorneys for Plaintiff,
(sgd.) Delmar W. Holloman,
Of Counsel.

DISTRICT OF COLUMBIA, ss:

Louis A. Gravelle being first duly sworn, on oath deposes and says that he is one of the attorneys employed to prosecute the above and foregoing claim of the Assiniboine Indians under a contract with the Assiniboine Indians of the Fort Belknap Reservation, Montana, which contract has been duly approved by the Commissioner of Indian Affairs in accordance with the provisions of Section 2103 of the United States Revised Statutes; that he appears therein under authority thereof; that he has read the above and foregoing petition and knows the contents thereof and that the statements therein are true to the best of his knowledge and belief.

(sgd.) LOUIS A. GRAVELLE.

Subscribed and sworn to before me this 18 day of July, 1951.

[SEAL] (sgd.) MARY V. JUDGE,
Notary Public, D. C.

My Commission expires: Oct. 1, 1955.

DISTRICT OF COLUMBIA, ss:

Adrien F. Busick being first duly sworn, on oath deposes and says that he is a member of the firm of attorneys Davies, Richberg, Beebe, Busick & Richardson which firm is employed to prosecute the above and foregoing claim of the Assiniboine Indians under a contract with the Assiniboine Indians of the Fort Peck Reservation, Montana, approved by the Commissioner of Indian Affairs in accordance with the provisions of Section 2103 of the Revised Statutes; that said firm appears herein under authority thereof; that he has read the above and foregoing petition and

knows the contents thereof and that the statements therein are true to the best of his knowledge and belief.

(Sgd.) ADRIEN F. BUSICK.

Subscribed and sworn to before me this 18 day of July, 1951.

(Sgd.) MARY V. JUDGE,
Notary Public, D. C. (Seal.)

My Commission expires: Oct. 1, 1955.

I hereby certify that on the — day of July, 1951, fifteen (15) copies of the above and foregoing petition were mailed to the Attorney General of the United States at the Department of Justice, Washington, D. C.

(Sgd.) LOUIS A. GRAVELLE,
(Sgd.) ADRIEN F. BUSICK,
Attorneys of Record for Plaintiff.

APPENDIX A

Treaty for the Cession of Louisiana

Concluded April 30, 1803; ratification advised by the Senate October 20, 1803; ratified by the President October 21, 1803; ratifications exchanged October 21, 1803; proclaimed October 21, 1803.

Articles

I. Cession of the colony of Louisiana.
II. Extent of cession.
III. Citizenship to inhabitants.
IV. Transfer of territory.
V. Assumption of possession.
VI. Treaties with Indians.
VII. Privileges to French and Spanish ships.
VIII. Most favored nation clause.
IX. Approval of other conventions.
X. Ratification.

The President of the United States of America, and the First Consul of the French Republic in the name of the French People desiring to remove all source of misunderstanding relative to objects of discussion mentioned in the second and fifth articles of the Convention of the $\left\{\begin{matrix}\text{8th Vendemiaire an 9} \\ \text{30 September 1800}\end{matrix}\right\}$ relative to the rights claimed by the United States in virtue of the Treaty concluded at Madrid the 27 of October 1795, between His Catholic Majesty, & the said United States, & willing to strengthen the union and friendship which at the time of the said Convention was happily reestablished between the two nations have respectively named their Plenipotentiaries to wit the President of the United States, by and with the advice and consent of the Senate of the said States; Robert R. Livingston Minister Plenipotentiary of the United States and James Monroe Minister Plenipotentiary and Envoy extraordinary of the said States near the Government of the French Republic; And the First Consul in the name of the French

People, Citizen Francis Barbe Marbois Minister of the public treasury who after having respectively exchanged their full powers, have agreed to the following Articles.—

Article I

Whereas by the Article the third of the Treaty concluded at St. Idelfonso the {9th Vendemiaire an 9 / 1st October 1800} between the First Consul of the French Republic and his Catholic Majesty it was agreed as follows.—"His Catholic Majesty promises and engages on his part to cede to the French Republic six months after the full and entire execution of the conditions and stipulations herein relative to his Royal Highness the Duke of Parma, the Colony or Province of Louisiana with the same extent that it now has in the hands of Spain, & that it had when France possessed it; and such as it should be after the Treaties subsequently entered into between Spain and other States."

And whereas in pursuance of the Treaty and particularly of the third article the French Republic has an incontestible title to the domain and to the possession of the said Territory—The First Consul of the French Republic desiring to give to the United States a strong proof of his friendship doth hereby cede to the said United States in the name of the French Republic forever and in full sovereignty the said territory with all its rights and appurtenances as fully and in the same manner as they have been acquired by the French Republic in virtue of the above mentioned Treaty concluded with his Catholic Majesty.

Art: II

In the cession made by the preceding article are included the adjacent Islands belonging to Louisiana all public lots and squares, vacant lands and all public buildings, fortifications, barracks and other edifices which are not private property. The Archives, papers and documents relative to the domain and sovereignty of Louisiana and its dependencies will be left in the possession of the Commissaries of the United States, and copies will be afterwards given in

due form to the Magistrates and Municipal officers of such of the said papers and documents as may be necessary to them.

Art: III

The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess.

Art: IV

There shall be sent by the Government of France a Commissary to Louisiana to the end that he do every act necessary as well to receive from the Officers of his Catholic Majesty the said country and its dependencies in the name of the French Republic if it has not been already done as to transmit it in the name of the French Republic to the Commissary or agent of the United States.

Art: V

Immediately after the ratification of the present Treaty by the President of the United States and in case that of the first Consul's shall have been previously obtained, the Commissary of the French Republic shall remit all military posts of New Orleans and other parts of the ceded territory to the Commissary or Commissaries named by the President to take possession—the troops whether of France or Spain who may be there shall cease to occupy any military post from the time of taking possession and shall be embarked as soon as possible in the course of three months after the ratification of this treaty.

Art: VI

The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the

United States and the said tribes or nations other suitable articles shall have been agreed upon.

Art: VII

As it is reciprocally advantageous to the commerce of France and the United States to encourage the communication of both nations for a limited time in the country ceded by the present treaty until general arrangements relative to the commerce of both nations may be agreed on: it has been agreed between the contracting parties that the French ships coming directly from France or any of her colonies loaded only with the produce and manufactures of France or her said Colonies; and the ships of Spain coming directly from Spain or any of her colonies loaded only with the produce or manufactures of Spain or her Colonies shall be admitted during the space of twelve years in the Port of New-Orleans and in all other legal ports-of-entry within the ceded territory in the same manner as the ships of the United States coming directly from France or Spain or any of their Colonies without being subject to any other or greater duty on merchandize or other or greater tonnage than that paid by the citizens of the United States.—

During the space of time above mentioned no other nation shall have a right to the same privileges in the Ports of the ceded territory—the twelve years shall commence three months after the exchange of ratifications if it shall take place in France or three months after it shall have been notified at Paris to the French Government if it shall take place in the United States; It is however well understood that the object of the above article is to favour the manufactures, commerce, freight and navigation of France and of Spain so far as relates to the importations that the French and Spanish shall make into the said ports of the United States without in any sort affecting the regulations that the United States may make concerning the exportation of the produce and merchandize of the United States, or any right they may have to make such regulations.—

Art: VIII

In future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most favoured nations in the ports above mentioned—

Art: IX

The particular Convention signed this day by the respective Ministers having for its object to provide for the payment of debts due to the Citizens of the United States by the French Republic prior to the 30th Sept 1800 (8th Vendemiaire an 9) is approved and to have its execution in the same manner as if it had been inserted in this present treaty and it shall be ratified in the same form and in the same time so that the one shall not be ratified distinct from the other—

Another particular Convention signed at the same date as the present treaty relative to a definitive rule between the contracting parties is in the like manner approved and will be ratified in the same form, and in the same time and jointly.—

Art: X

The present treaty shall be ratified in good and due form and the ratifications shall be exchanged in the space of six months after the date of the signature by the Ministers Plenipotentiary or sooner if possible.

In faith whereof the respective Plenipotentiaries have signed these articles in the French and English languages; declaring nevertheless that the present Treaty was originally agreed to in the French language; and have thereunto affixed their seals.

Done at Paris the tenth day of Floreal, in the eleventh year of the French Republic; and the 30th of April 1803.

Robt R. Livingston
[Seal.]

Jas. Monroe
[Seal.]

Barbe Marbois
[Seal.]

APPENDIX B

Treaty of Fort Laramie With Sioux, Etc., 1851

Articles of a treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros Ventre Mandans, and Arrickaras, parties of the second part, on the seventeenth day of September, A. D. one thousand eight hundred and fifty-one.

Article 1. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.

Article 2. The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories.

Article 3. In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty.

Article 4. The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by any band or individual of their people, on the people of

the United States, whilst lawfully residing in or passing through their respective territories.

ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; then down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River; and thence down Heart River to the place of beginning.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-

five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head-waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the headwaters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations, through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

ARTICLE 7. In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs, the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per

annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may withhold the whole or a portion of the annuities mentioned in the preceding article from the nation so offending, until, in the opinion of the President of the United States, proper satisfaction shall have been made.

In testimony whereof the said D. D. Mitchell and Thomas Fitzpatrick commissioners as aforesaid, and the chiefs, headmen, and braves, parties hereto have set their hands and affixed their marks, on the day and at the place first above written.

D. D. MITCHELL
THOMAS FITZPATRICK
Commissioners.

Sioux:

Mah-toe-wha-you-whey, his x mark.
Mah-kah-toe-zah-zah, his x mark.
Bel-o-ton-kah-tan-ga, his x mark.
Nah-ka-pah-gi-gi, his x mark.
Mak-toe-sah-bi-chis, his x mark.
Meh-wha-tah-ni-hans-kah, his x mark.

Cheyennes:

Wah-ha-nis-satta, his x mark.
Voist-ti-toe-vetz, his x mark.
Nahk-ko-me-ien, his x mark.
Koh-kah-y-wh-cum-est, his x mark.

Arrapahoes:

Be-ah-te-a-qui-sah, his x mark.
Neb-ni-bah-seh-it, his x mark.
Beh-kah-jay-beth-sah-es, his x mark.

Crows:

Arra-tu-ri-sash, his x mark.
Doh-chepit-seh-chi-es, his x mark.

Assinaboines:

Mah-toe-wit-ko, his x mark.
Toe-tah-ki-eh-nan, his x mark.

Mandans and Gros Ventres:

Nochk-pit-shi-toe-pish, his x mark.
She-oh-mant-ho, his x mark.

Arickarees:

Koun-hei-ti-shan, his x mark.
Bi-atch-tah-wetch, his x mark.

In the presence of—

A. B. Chambers, Secretary.
S. Cooper, colonel, U. S. Army.
R. H. Chilton, captain, First Drags.
Thomas Duncan, captain, Mounted Riflemen.
Thos. G. Rhett, brevet captain R. M. R.
W. L. Elliott, first lieutenant R. M. R.
C. Campbell, interpreter for Sioux.
John S. Smith, interpreter for Cheyennes.
Robert Meldrum, interpreter for the Crows.
H. Culbertson, interpreter for Assiniboines and Gros Ventres.
Francois L'Etalie, interpreter for Arickarees.
John Pizelle, interpreter for the Arrapahoes.
B. Gratz Brown.
Robert Campbell.
Edmond F. Chouteau.

APPENDIX C

HEADQUARTERS DEPARTMENT OF DAKOTA,

Saint Paul, Minn., July 16, 1868.

GENERAL ORDERS No. 21

Subject to the approval of the Secretary of War, the public lands inclosed by the hereinafter-described survey are hereby reserved to the United States for military purposes and declared to be the military reservation of the post of Fort Buford, Dakota Territory.

The initial point is at the intersection of the 104th degree of longitude west from Greenwich with the 48th parallel of north latitude; thence run south fifteen (15) miles, thence east fifteen (15) miles, thence north thirty (30) miles, thence west thirty (30) miles, thence south thirty (30) miles, thence east fifteen (15) miles; at the apex of each of the angles of the square thus described a square-cut stone one (1) foot on the edge and three and one-half (3½) feet in length will be firmly inbedded eighteen (18) inches in the ground. On the inner face of each stone the letters "U. S." will be chiseled in raised letters. On the outer face of each stone will be painted the words "Military reservation."

The post commander will cause the lines as herein described to be run without delay by an officer of his command and the inclosed area platted with as much accuracy as the circumstances will permit. A copy of the plat will be forwarded to these headquarters as soon as made for the information and action of the War Department.

The chief quartermaster of the department will purchase a compass and chain and forward with the least delay practicable to the commanding officer of Fort Buford for use in making the survey herein required.

By command of Bvt. Maj. Gen. A. H. Gerry.

O. D. GREENE,
Assistant Adjutant General.

Official:

_____ _____,
Assistant Adjutant General.

EXECUTIVE MANSION,

August 18, 1868.

The reservation within described in General Orders, No. 21, of July 16, 1868, Headquarters Department of Dakota, and approved by the Secretary of War, is made for military purposes, and the Secretary of the Interior will cause the same to be noted in the General Land Office, to be reserved as a military post.

ANDREW JOHNSON.

APPENDIX D

Executive Mansion, April 13, 1875.

It is hereby ordered that the tract of country, in the Territory of Montana, lying within the following-described boundaries, viz:

Commencing at a point on the Musselshell River where the same is intersected by the forty-second parallel of north latitude; thence east with said parallel to the south bank of the Yellowstone River; thence down and with the south bank of said river to the south boundary of the military reservation at Fort Buford; thence west along the south boundary of said military reservation to its western boundary; thence north along said western boundary to the south bank of the Missouri River; thence up and with the south bank of said river to the mouth of the Musselshell River; thence up the middle of the main channel of said Musselshell River to the place of beginning, be, and the same hereby is, withdrawn from sale, and set apart as an addition to the present reservation for the Gros Ventre, Piegan, Blood, Blackfeet, and Crow Indians.

U. S. GRANT.

APPENDIX E

Executive Mansion, July 13, 1880.

It is hereby ordered that the tract of country in the Territory of Montana, being a portion of the tract of country which was set aside by Executive order of the 13th April, 1875, as an addition to the then existing reservation for the Gros Ventre, Piegan, Blood, Blackfeet, and Crow Indians, known as the Blackfeet Reservation, and lying within the following-described boundaries, viz: Beginning at a point where the south boundary of the Fort Buford military reserve intersects the right bank of the Yellowstone River; thence according to the true meridian west along the south boundary of said military reserve to its western boundary; thence continuing west to the right bank of the Missouri River; thence up and along said right bank, with the meanders thereof, to the middle of the main channel of the Musselshell River; thence up and along the middle of the main channel of the Musselshell River, with the meanders thereof, to its intersection with the forty-seventh parallel of north latitude, thence east along said parellel to its intersection with the right bank of the Yellowstone River; thence down and along said right bank, with the meanders thereof, to the place of beginning, be, and the same hereby is, restored to the public domain.

R. B. Hayes.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 323

THE ASSINIBOINE INDIAN TRIBE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims is reported in 121 F. Supp. 906, and appears in the appendix to the petition, pp. 1-18. The opinions of the Indian Claims Commission, reported in 2 Ind. Cls. Comm. 272, are also in the appendix to the petition, pp. 33-58.

JURISDICTION

The judgment of the Court of Claims was entered on June 8, 1954. The petition for a writ of

certiorari was filed on September 1, 1954. The jurisdiction of this Court is invoked under section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70s and 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether a previous decision and judgment of the Court of Claims fixing the liability of the United States for the taking of petitioner's lands is *res judicata* of a claim for additional compensation (the value of the lands plus interest from the date of taking) filed under the Indian Claims Commission Act.

2. Whether a legal claim which has previously been finally adjudicated can be re-litigated under section 2, clause 5 of the Indian Claims Commission Act providing for claims based on "fair and honorable" dealings.

STATUTE INVOLVED

The Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U.S.C. 70, and the Jurisdictional Act of March 2, 1927, 44 Stat. 1263, are set out in the appendix to the petition, pp. 21-32, 19-21.

STATEMENT

By the Act of March 2, 1927, 44 Stat. 1263, Congress conferred jurisdiction on the Court of Claims to "adjudicate and render judgment in any and all claims arising under or growing out of the Treaty of Fort Laramie of September 17, 1851 * * * between the Government of the United

States and the Assiniboine Indian Nation * * *." Section 4 of the Act provided that in cases where the taking was unlawful the damages awarded should be confined to "the value of the money or other property at the time of such appropriation or disposal."

Pursuant to that Act petitioner in 1930 filed suit in the Court of Claims to recover "damages" for the appropriation of certain land alleged by petitioner to have been owned by it by "immemorial possession" and also to have been granted to it by the Treaty of Fort Laramie dated September 17, 1851, 11 Stat. 749. *Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347. As noted by the court below (Pet. App. 5), petitioner in that suit contended its lands had been *wrongfully* appropriated. Interest from the date of taking as an element of compensation was not asked for. The Court of Claims found that petitioner had failed to prove title by immemorial possession (77 C. Cls. at p. 368), but did find and hold that 6,477,940 acres "were expressly granted to the plaintiff tribe [petitioner] by the treaty made with the plaintiff on September 17, 1851". Fdg. VIII, 77 C. Cls. 356, 370-371. The court, after stating that "the lands granted the plaintiff tribe by the Treaty of Fort Laramie were taken over by the Government", stated: "We conclude that the value of this land at the time it was taken did not exceed 50 cents an acre and may have been less, and that its total value did not exceed $3,238,970." 77 C. Cls. 371, 373. Since as the

court below noted in its opinion in the instant case (Pet. App. 2) allowable offsets for expenditures by the Government exceeded this amount, "this judgment in favor of the tribe was satisfied by the judgment against the tribe for the offsets and final judgment was entered dismissing the petition." This Court denied certiorari, 292 U. S. 606.

In November, 1950, seventeen years after the judgment of the Court of Claims in the first case, petitioner instituted the present action to recover for the same taking of the same lands. This time, however, petitioner's case was pitched on the theory that the taking of its lands was lawful because ratified by Congress and that petitioner is entitled to just compensation under the Fifth Amendment. Petitioner sought judgment for $11,681,355 as the value of the land as of the date of taking, plus an increment for delay in payment "measured by a reasonable rate of interest [on the $11,681,355, of course] from the time of taking to the date of payment" (Am. Compl. pars. IX, XI, and XII).[1]

The United States filed a motion for summary judgment on the ground that the decision and judgment in the prior case is *res judicata* of the claim now advanced. The Indian Claims Commission granted the motion and, on appeal, the Court of Claims affirmed, one judge dissenting.

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[1] Since the latest of the takings claimed was in 1880 (Am. Compl., par. X), it is apparent that interest on eleven and one-half million dollars over a period of seventy-five years brings petitioner's claim to a staggering total regardless of what is considered a "reasonable" rate of interest.

ARGUMENT

1. The provision of the Indian Claims Commission Act (Section 2, Pet. App. 22) waiving the statute of limitations and laches but providing that "all other defenses shall be available to the United States" makes it clear that the defense of *res judicata* was fully preserved. Petitioner, attempting to establish the contrary, relies (Pet. 22) on the statement of the House Managers on the conference report on the bill as enacted.

Since the statute is clear and unambiguous, only the most compelling legislative history could warrant a contrary reading. Cf. *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89. However, as it had previously done in *Blackfeet and Gros Ventre Tribes of Indians* v. *United States*, 119 F. Supp. 161, the court below demonstrates conclusively (Pet. App. 14-15) that the legislative history of the Act shows, as the Act itself provides, a clear intent to preserve without qualification the defense of *res judicata*. That history, as set out by the court below, is summarized at pp. 6-7 of the Government's brief in opposition to the petition for certiorari in the *Blackfeet* case, No. 255, October Term, 1954.

The fallacy underlying this petition is in saying that the taking of petitioner's lands gave rise to more than one cause of action. But as the court below correctly observed (Pet. App. 4) "the appropriation of appellant's land by the United States gave rise to but one cause of action in appellant for the deprivation or taking of the same land." Since there is a single, complete, and final appropriation of appellant's land, there is a single cause of action.

Baltimore Steamship Co. v. *Phillips,* 274 U. S. 316, 321. That a specific taking may or may not be unlawful, in the sense of being unauthorized by Congress, does not alter this fact. For a like reason, as the court below points out (Pet. App. 10; and see Pet. App. 42, 57), the value of the land and interest for delay in payment do not give rise to two causes of action but together constitute just compensation for a single taking.

Petitioner of course agrees that the 1927 jurisdictional act gave jurisdiction to the court below to adjudicate claims for a wrongful taking, since it contends that the 1927 Act was confined to such claims (Pet. 8-15). So in the earlier case, when petitioner elected to rest its case on an unlawful taking, the decision and judgment that there had been such a taking and fixing the liability accordingly was clearly within the jurisdiction of the court below. Hence the judgment in the prior case is clearly a bar to a second action based on a new theory that the taking was lawful, for section 4 of the 1927 Act itself (Pet. App. 20) expressly provided that the decree of the court below shall be in full settlement of all damages for such wrongful taking. Cf. *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 295.[2]

Moreover, as the court below points out (Pet. App. 10), the former judgment is a bar to future

[2] It was on this basis that Commissioner Witt in his concurring opinion (Pet. App. 57-58) appraised the matter, and therefore he did not reach the question of whether under the 1927 Act petitioner could have sued for a taking by eminent domain.

litigation, not only as to matters expressly litigated, but also as to issues which could have been presented. And it is clear that petitioner could, under the 1927 Act, have presented the claim it now seeks to litigate, that is, that the taking was by eminent domain and that it was entitled to the value of the land plus interest thereon for delay in payment.

Section 1 of the 1927 Act, with respect to the Fort Laramie treaty lands, empowered the court to adjudicate and render judgment in "*any and all* claims arising under or growing out of the Treaty of Fort Laramie," and the committees of both the Senate and House in reporting the bill stated that it "is drafted in broad language *to permit of a final adjudication of all the claims of the Assiniboine Indians.*" (Pet. App. 19, 6; italics supplied). It is immaterial that no specific provision for interest was included, *Shoshone Tribe of Indians* v. *United States,* 299 U.S. 476, 497. Section 4 of the Act, barring interest, relates only to wrongful takings. As the court below points out (Pet. App. 8), that section has nothing to do with the type of claims that could be litigated under section 1 and does not in any way limit the broad coverage of that section.[3]

[3] Petitioner's argument (Pet. 9-10) that the amendment of section 1 by the House narrowed its scope is groundless. The House amendment was made at the request of the Secretary of the Interior, who gave no indication that the House and Senate versions were in any legal sense different, and they are not. Thus, even after amendment, the House Committee, as had the Senate Committee, stated that "This bill is drafted in broad language to permit of a final adjudication of all the claims of the Assiniboine Indians." H. Rept. 952, 69th Cong., 1st sess., p. 2.

Thus an identical provision in another act did not preclude an award for a taking by eminent domain. *United States* v. *Klamath Indians,* 304 U.S. 119.

Many years before the entry of judgment in the prior case, this Court had established that, as to lands held under treaty, Indian tribes enjoy the protection of the Fifth Amendment. *Yankton Sioux Tribe* v. *United States,* 272 U.S. 351, 359, in which it was held that where the Government had taken lands of the Tribe "they are entitled to just compensation under the power of eminent domain." And the Court of Claims, on remand of that case, made an award for the value of the lands, plus interest from the date of taking. 65 C. Cls. 427, 429. And, as the Court of Claims points out (Pet. App. 12), the subsequent decisions of this Court have always sustained that proposition.[4]

It is thus clear that under the 1927 Act the court below had jurisdiction to entertain a claim under the Fifth Amendment. Hence, since petitioner could have litigated the present demand in that

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[4] Petitioner (Pet. 16) seeks to differentiate its case by asserting that it had Indian title, i.e., title by immemorial possession. But that was expressly decided against it in the earlier suit, and it was expressly adjudged that its title sprang from the Ft. Laramie treaty (*supra,* p. 3). Petitioner evidently does not realize that if its interest in the lands was merely Indian title, its present suit would fail, irrespective of *res judicata,* because the taking of such title is not a taking under the Fifth Amendment, and hence the real objective of the present suit, interest from date of taking, would not be recoverable. *United States* v. *Tillamooks,* 341 U. S. 48.

proceeding, the earlier judgment renders the present claim *res judicata.*[5]

2. Petitioner (Pet. 25-26) for the first time in this case seeks to rely on clause 5 of section 2 of the Indian Claims Commission Act, providing for claims based on "fair and honorable dealings." The Court of Claims and the Indian Claims Commission, of course, do not discuss this contention since it was not raised below. But they flatly rejected the proposition that the defense of *res judicata* could thus be circumvented in *The Blackfeet and Gros Ventre Tribe of Indians, etc.* v. *United States,* No. 255, October Term, 1954.

Petitioner's brief reference to clause 5 ignores the other clauses of section 2. In that section (Pet. App. 22), Congress listed four classes of cases in which it consented that the United States might be sued. All four are categories where the claims of the Indians are based on grounds well recognized in law or equity as the basis of judicial relief, and peti-

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[5] Petitioner's reliance (Pet. 16-18) on the "intervening decision" doctrine is of course baseless. As the court below points out (Pet. App. 11-12) the doctrine is limited to situations where a second and independent cause of action arises after the intervening decision. Moreover, there is no intervening decision here. *Shoshone Tribe* v. *United States,* 299 U. S. 476, did not, as petitioner states (Pet. 17), involve Indian title, but a title arising under a treaty, as does petitioner's. Thus that case is simply one of a uniform series of cases holding such title compensable, does not present any change in the decisions, and plainly shows that petitioner could have presented its present claim in the earlier suit.

tioner's claim is embraced in clauses 1 and 4.[6] Congress then added a fifth category—"claims based upon fair and honorable dealings *that are not recognized by any existing rule of law or equity*" (emphasis added). Clearly, the aim of clause 5 of section 2 was to provide for a new class of cases hitherto unknown to law or equity, and of course distinct from the classes of cases listed in clauses 1 through 4.[7]

If clause 5 meant, as petitioner contends, that cases falling into the first four classes, i.e., claims recognized by law or equity, could be litigated on

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[6] "* * * (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; * * * (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; * * *."

[7] The House Committee on Indian Affairs, reporting the bill creating the Indian Claims Commission (H. Rep. No. 1466, 79th Cong., 1st sess., p. 12), explained the "fair and honorable dealings" clause by referring to past instances in which claims "not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts." The example cited was the Tlingit and Haida Claims Act of 1935, 49 Stat. 388, which detailed particular instances in which the Indians may have been deprived of interests, neither legal nor equitable in origin, for which they should, in justice, be paid. The Congress undoubtedly also had in mind the cases in which the court below and this Court had denied relief, under special jurisdictional acts, because the Indian claim was not legal or equitable, but only moral. See e.g., *Blackfeather* v. *United States*, 190 U. S. 368, 373; *Sac and Fox Indians* v. *United States*, 220 U. S. 481, 489; *Sioux Tribe* v. *United States*, 97 C. Cls. 613, 670; cf. *Sioux Tribe* v. *United States*, 316 U. S. 317, 331.

the basis of "fair and honorable dealings," then the first four clauses of section 2 would be surplusage because all claims previously adjudicated could be phrased in the language of clause 5. But, as the court below stated in *Western Cherokee Indians, et al.* v. *United States,* 116 C. Cls. 665, 677-678, certiorari denied, 340 U.S. 904, "Clause (5) obviously has reference to the fundamental character of the claim rather than to the theory on which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission." And unquestionably the fundamental character of the claim of petitioners in the present suit is a legal claim under the Fifth Amendment falling expressly under clauses 1 and 4 of section 2. Petitioner's argument on this point is merely an indirect attempt to defeat the defense of *res judicata* which, as we have shown, was preserved to the United States.

CONCLUSION

The questions were correctly decided below and do not call for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 [illegible]